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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM BEVAN AND WAVA BEVAN,
PETITIONERS,

v.

TOWNSHIP OF BRANDON, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI FROM STATE OF MICHIGAN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

COLLEEN V. RONAYNE
Counsel of Record For Petitioners
THOMAS J. RYAN, P.C.
2055 Orchard Lake Road
Sylvan Lake, Mich. 48320
(313) 334-9938

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT OF MICHIGAN IMPROPERLY INTERPRETED PLAINTIFFS' TAKING CLAIM UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN REVERSING THE MICHIGAN COURT OF APPEALS AND THE TRIAL COURT BELOW?

II. WHETHER THE LAND OWNER OF TWO SEPARATE CONTIGUOUS LOTS IS DENIED THE USE OF ONE OF THOSE, IE., IS ONE TAKEN BY THE OPERATION OF DEFENDANT TOWNSHIP ZONING ORDINANCE AND PRIVATE ROAD ORDINANCE BY RESTRICTING THE USE OF ONLY ONE PARCEL AS A SINGLE FAMILY RESIDENTIAL SITE?

III. WHETHER THE MICHIGAN SUPREME COURT IMPROPERLY INTERPRETED AND APPLIED THE BRANDON TOWNSHIP PRIVATE ROAD ORDINANCE TO THE FACTS OF THIS CASE IN LIGHT OF ESTABLISHED FEDERAL TAKING JURISPRUDENCE?

PARTIES TO THE PROCEEDINGS BELOW

The following parties were Plaintiffs-Appellees in the Michigan Supreme Court: William Bevan and Wava Bevan, his wife.

Defendants-Appellants in the Michigan Supreme Court were: Township of Brandon, a municipal corporation, and Township of Brandon Zoning Board of Appeals.

Two Amicus Curiae Briefs in the Michigan Supreme Court were allowed to be filed one by John Bauckham and Lynda E. Thomsen of Bauckham, Sparks, Rolfe & Thomsen, P.C. for the Michigan Townships Association, and the other by Gerald A. Fisher of Kohl, Secrest, Wardle, Lynch, Clark and Hampton filed on behalf of the Michigan Municipal League, City of Auburn Hills, City of Bloomfield Hills, Township of Bloomfield, City of Farmington, City of Farmington Hills, Charter Township of Independence, Charter Township of Oakland and Charter Township of West Bloomfield.

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PETITION FOR A WRIT OF CERTIORARI

William Bevan and Wava Bevan, his wife, respectfully request that this Court issue a Writ of Certiorari to review the Opinion of the State of Michigan Supreme Court in Bevan v. Brandon Township, Docket No. 86358, decided September 9, 1991.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court in Bevan v. Brandon Township, Docket No. 86358, decided September 9, 1991, is reprinted in the Appendix (App.) p. 1a. The Opinion of

the Michigan Court of Appeals dated April 17, 1989, Docket No. 103711 is reprinted at App. p.28a. The Opinion of the Trial Court before Honorable James S. Thorburn, Sixth Circuit Court, State of Michigan, Docket No. 86-323355-AA is reprinted at App. p.34a. The Judgment of Trial Court by Honorable James S. Thorburn, Sixth Circuit Court, State of Michigan, Docket No. 86-323355-AA is reprinted at App. p.36a. The Stipulation and Order as to Material Facts, Sixth Circuit Court, State of Michigan, Docket No. 86-323355-AA is reprinted at App. p.40a. The Brandon Township Zoning Ordinance Section 5.07 is reprinted at App. p.44a. The Private Road Ordinance for Brandon Township effective February 13, 1977, is reprinted at App. p.47a. The Trial Court Argument Transcript of August 20, 1987, before the Honorable James S. Thorburn, Sixth Circuit Court, State of Michigan, Docket No. 86-323355-AA is reprinted at App. p.56a.

JURISDICTION

Petitioners brought this suit in the Sixth Judicial Circuit for the State of Michigan invoking the Fifth and Fourteenth Amendments to the United States Constitution and 42 USC 1983, seeking temporary damages for the alleged temporary taking of one lot of the Petitioners' real property. The Trial Court and the Court of Appeals upheld the Petitioners' Petition and found that indeed a temporary taking had been accomplished by the Respondent Township. On the Township's appeal, the Michigan Supreme Court on September 9, 1991, reversed the Court of Appeals and the Trial Court below. The jurisdiction of this Court is invoked under 28 USC Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS PROVIDED

This case involves the Fifth Amendment to the Constitution and the Fourteenth Amendment which provides in part:

> . . . [N]or shall any person . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

It also involves 42 USC 1983, which provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory . . . subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or proper proceeding for redress . . .".

STATEMENT OF THE CASE

A. Nature of the Case

This matter was tried on Stipulated Facts by the Oakland County Circuit Court. Honorable James S. Thorburn heard and decided this matter by written Opinion dated August 31, 1987. On September 23, 1987, the Judgment mirroring the Court's Opinion was entered.

The facts are basically simple. Mrs. Bevan purchased the two (2) vacant parcels in Brandon Township. Both parcels are on Hummer Lake in Brandon Township and the parcels are contiguous. The parcels were purchased separately from two separate sellers, one purchased in 1954 with deed taken in 1964 and the other parcel purchased in 1964 with deed taken in 1970. The parcels had separate tax identification numbers since before Plaintiff purchased these parcels, and the parcels have separate tax identification numbers today. Each parcel meets or exceeds all area and lot regulations of the Brandon Township Zoning Ordinance, as amended. Each parcel is zoned single family residential and provides adequate area for a single family house to be constructed.

Until the adoption of the Brandon Township Zoning Ordinance in May of 1974 and the Brandon Township Private Road Ordinance in February of 1977, Plaintiffs could construct a single family residence on each parcel. Access to each parcel has been

by a twenty (20) foot easement of record which was contained in Plaintiff's land contracts and warranty deeds. This easement is in the shape of an inverted L with the foot of the L running the width of the two (2) parcels. This easement was used by Plaintiff's predecessor in title and Plaintiffs. This easement, prior to 1974, would have provided acceptable access to these two (2) parcels.

Plaintiffs went to Brandon Township to obtain two (2) building permits, one for each parcel. Plaintiffs were told that because of Brandon Township's Zoning Ordinance and Private Road Ordinance, Plaintiffs would be required to provide a private road right-of-way of at least 66 feet in width to be allowed two (2) building sites. Plaintiffs sought a variance from this regulation of Brandon Township and Plaintiffs appeared before the Brandon Township Zoning Board of Appeals on August 28, 1985. At that hearing the Brandon Township Zoning Board of Appeals denied Plaintiffs their request for variance and agreed with the Building Official that only one (1) single family building permit would be allowed. Plaintiffs sought to sell both parcels to the Department of Natural Resources for the State of Michigan, and after that failed, instituted the action below from which Defendants appealed.

On April 17, 1989, the Court of Appeals citing *Krompf* v. *City of Sterling Heights*, 391 Mich 139, 163; 215 NW 2d 179 (1974), and *Hecht* v. *Nile Twp.*, 173 Mich App 453; 434 NW 2d 156 (1988) affirmed the Trial Court. The Court of Appeals held the Township's Private Road Ordinance, as applied to Plaintiff's property, precluded its use for any purpose to which it is reasonably adapted.

On February 28, 1990, the Michigan Supreme Court denied the Application for Leave to Appeal and Defendants-Appellants filed a Motion for Reconsideration.

The Supreme Court of Michigan granted the Township's reconsideration of its Delayed Application for Leave to Appeal

and on September 9, 1991, the Michigan Supreme Court reversed the Opinion of the Court of Appeals and Trial Court below.

B. Posture of the Case

The September 9, 1991, Opinion of the Michigan Supreme Court resulted in the highest court in the State of Michigan rendering a full and final Judgment on the merits of Petitioners' case. Since the Michigan Supreme Court decided without dissent against Petitioners herein, Petitioners have decided to file directly to the United States Supreme Court on this Writ of Certiorari believing that Opinion of the Michigan Supreme Court fails to comply with Federal taking jurisprudence through the Fifth and Fourteenth Amendments of the United States Constitution and 42 USC 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory . . . subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the depravation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or proper proceeding for redress. . ."

REASONS FOR GRANTING THE WRIT

It is believed by Petitioners that this case is akin to a recent matter granted for Certiorari by this Honorable Court, *Lucas* v. *South Carolina Coastal Commission,* cert. filed 9-13-91, U.S. Supreme Court Docket No. 91-453. In the case at bar, the Petitioners have alleged a temporary taking by the action of state government or political subdivision. The forced joinder of these two (2) separate parcels by government action provides no public good, unduly burdens private individuals, interferes with their reasonable economic expectations and takes valuable property rights without commensurate temporary compensation. It is submitted by Petitioners that the action of the Michigan Supreme Court in reversing the Decision of the Michigan Court of Appeals

and the Trial Court below does not comport with established taking jurisprudence under the Fifth and Fourteenth Amendments of the United States Constitution nor the privileges, rights and immunities granted Petitioners under 42 USC 1983.

ARGUMENT

I WHETHER THE SUPREME COURT OF MICHIGAN IMPROPERLY INTERPRETED PLAINTIFFS' TAKING CLAIM UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN REVERSING THE MICHIGAN COURT OF APPEALS AND THE TRIAL COURT BELOW

Federal Law.

The Defendants-Appellees and Amicus Counsel attempted to portray the Plaintiffs as not having a "ripe" claim or having failed to exhaust their administrative remedies. A look at the significant cases of this Honorable Court will show the Plaintiffs have met each test to succeed with their cause of action. In *Agins:*

> "The landowners had not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."

Agins v. *Tiburon*, 447 US 255, 260, 65 L Ed 2d 106, 111, 100 S Ct 2138 (1980). In the case at bar, the Plaintiffs applied for two (2) building permits, one for each lot and were denied. In *San Diego Gas and Electric Co.* v. *San Diego*, 450 US 621, 633 67 L Ed 2d 551, 561, 101 S Ct 1287 (1981); the State Court could not factually determine whether a taking had occurred leaving the issue unresolved for the United States Supreme Court. In the case at bar, the Trial Court has found a taking.

In *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 452 US 264, 295, 69 L Ed 2d 1, 28, 101 S Ct 2352; the United States Supreme Court was faced with:

> "No concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land."

In the case at bar, the ordinances have clearly effected Petitioners' land in specific and identifiable ways.

In *Williamson Planning Commission* v. *Hamilton Bank*, 473 US 172, 191, 87 L Ed 2d 126, 141, 105 S Ct 3108 (1985) the landowner did not seek a variance from an administrative agency. This Court held taking factors cannot be evaluated:

> "... until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

In the case at bar, the Plaintiffs sought a variance from the Township Zoning Board of Appeals and were denied. As a matter of state law, such denial was a final decision. Plaintiffs then sought Court review of that denial. The decision maker, the Township Zoning Board of Appeals, has made its final decision, the only review available was Circuit Court review.

In *MacDonald, Summer & Frates* v. *County of Yolo, et al.*, 477 US 340, 91 L Ed 2d 285, 294, 106 S Ct 2561 (1986), the Supreme Court found as in *Agins*, and *Williamson*, this property owner had failed to obtain:

> "A final decision on the type and intensity of development legally permitted on the subject property."

In the case at bar, Plaintiffs have a final decision from the Township Zoning Board of Appeals and that decision states how the subject property is to be developed.

The *Williamson* case establishes the guidelines for finality requirements and exhaustion of administrative remedies:

> "The finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ..." 473 US 172, 193, 87 L Ed 2d 126, 143, 105 S Ct 3108 (1985)

Williamson and *Patsy* v. *Florida Board of Regents*, 457 US 496, 512, 73 L Ed 2d 172, 185, 102 S Ct 2557 (1982) state the law regarding a 42 USC 1983 claim as not requiring an exhaustion of administrative or judicial procedures. The arguments of Defendants-Appellees that Plaintiffs must exhaust administrative procedures (which were done by Plaintiffs) or judicial procedures (which were also done by Plaintiffs) do not represent the state of the law for a party utilizing 42 USC 1983.

McNeese v. *Board of Education*, 373 US 668, 671; 83 S Ct 1433; 10 L Ed 2d 622 (1963) simply reiterated the status of Federal law regarding 42 USC 1983. The landmark decision in *Monroe* v. *Pape*, 365 US 167, 183; 81 S Ct 473; 5 L Ed 2d 492 (1961) cited by the Court of Appeals should end the inquiry engaged by Defendants-Appellees as to the use of this Federal statute. A Federal taking claim requires a final decision which inflicts concrete harm upon the Plaintiff landowner. A final decision requires at least (1) a rejected development plan, and (2) a denial of a variance. *Herrington* v. *County of Sonoma*, 857 F 2d 567 (9th Cir. 1988), both occurred in the case at bar.

FINAL DECISION

The statute authorizing a Circuit Court Appeal from a Zoning Board of Appeals Decision clearly does not mandate such an appeal MCL 125.293a; MSA 5.2963(23a). The only mandatory language "shall" involves the review of the case by the appropriate Circuit Court. Defendants-Appellees confuse the requirements for ordinary due process claims from Fifth and Fourteenth Amendments taking claims. Under the Federal law, as previously stated, the Plaintiffs-Appellants had received a final decision by the Brandon Township Zoning Board of Appeals. This comports with the Zoning Board of Appeals' statute as cited, being

> "The decision of the Board of Appeals rendered pursuant to Section 23, shall be final."

This statute does allow an Appeal to the Circuit Court. That issue is distinct from the challenge to an ordinance's constitutionality

and, as correctly stated by the Court of Appeals, does not require an Appeal from a Zoning Board of Appeals Decision to challenge an ordinance.

The Plaintiffs-Appellants in this matter sued not only under their Federal constitutional rights for a Federal taking, but also under the Michigan State Constitution of 1963, Article X, Section 2, for a State constitutional regulatory taking. This type of challenge was accepted by the Michigan Supreme Court in *Electro Tech* v. *Campbell*, 433 Mich 57; 429 NW 2d 625 (1989) as a legitimate inverse condemnation action. As Michigan does not have an inverse condemnation statute, as did Tennessee in *Williamson, supra,* the Plaintiffs utilized their Circuit Court suit to challenge the Defendants' decision and challenge Defendants' ordinances. Under the mandatory joinder requirements of Michigan Court Rules, MCR 2.203(a)(1), the Plaintiffs, in order to assist the efficient administration of justice, to bring a full and binding decision on this matter, sued under the various theories known to them at the time, some being Federal and some being State. In the case at bar, the Plaintiffs-Appellants did urge that under the Michigan Constitution their property had been taken by regulatory taking, did challenge under the Federal Constitution the taking, did utilize a Federal statute regarding civil rights violation, and did challenge the ordinance as not being reasonably related to public health, safety or welfare, coupled with their Appeal of the Zoning Board of Appeals' Decision. Under *Electro Tech, supra,* Plaintiffs have met or exceeded the criteria in Michigan, which are:

> "A property owner must first obtain a final decision from the particular governmental entity that is alleged to have unconstitutionally taken his property and also attempt to obtain just compensation through inverse condemnation."

The fact is that the Trial Court recognized a Federal constitutional taking and a Michigan constitutional taking by the awarding of attorney fees as damages for the temporary taking as cited in the 42 USC 1983 and the Uniform Condemnation Procedure Act. The Township argues that such procedure is not available for

inverse condemnation, but in fact the Trial Court recognized that, as the Plaintiffs were only seeking temporary damages for the cost and expense of litigation, such would be obtainable under the Federal and Michigan Constitution as well. As the Plaintiffs were allowed by court rule to file a Petition for Delayed Appeal, MCR 7.105(o), the Plaintiffs-Appellants under the compulsory joinder statute and for the efficient administration of justice brought all their claims to bear in one lawsuit to avoid possible inconsistent rulings, duplicity of litigation, and promote the efficient administration of justice. The Plaintiffs-Appellants did in fact contest in a parallel fashion their Federal and State constitutional and statutory rights being violated by the Appellee Township and most certainly have complied with the requirements of this Honorable Court and the Michigan Supreme Court relative to the *Electro Tech*, *supra*, test.

The award of attorney fees was appropriate based under *First English Evangelical Lutheran Church of Glendale* vs. *County of Los Angeles*, 482 US 304; 107 S.Ct. 2378; 96 L. Ed 2d 250 (1987) and *Poirier* vs. *Grand Blanc Township*, 167 Mich App 770; 423 NW 2d 351 (1988). As is seen by the Trial Transcript in the Appellants' Index, Page 38A, the evidence of damages Plaintiffs-Appellants requested for in this case for the temporary taking were the fees and costs associated with bringing the litigation after the Zoning Board of Appeals' Decision. It seems fully appropriate and consistent with prior Federal and Michigan case law that this Honorable Court finally rule in a definitive fashion that temporary damages for regulatory takings are available to Plaintiffs. The damages for temporary takings can be as numerous and creative as counsel can articulate. However, in this matter the value of the land was not requested because the Plaintiffs-Appellants were asking for an injunction to prohibit the enforcement of the ordinance to allow Plaintiffs to sell their other parcel as a building site. Thus, the damages requested in this matter were the costs and attorney fees associated with the action of the Township which directly related to the denial of the variance and creating the issue which brought Plaintiffs to seek a remedy through judicial review.

While it is understandable that the Township was concerned about the "paying of attorney fees" in all litigation, the facts of the case at bar reveal that the attorney fees were the only damages requested and those damages were directly related to action by the Township of Brandon.

Further, in view of the fact that the Plaintiffs-Appellants had met the *Electro Tech*, *supra*, case tests before bringing a 42 USC 1983 cause, such attorney fees were appropriate under that theory as well. It is respectfully submitted that the attorney fees continue through this date and any award by this Honorable Court in favor of Plaintiffs-Appellants should include not only the costs (including attorney fees) associated with the Trial Court, but also all appellate levels.

ARGUMENT

II WHETHER THE LAND OWNER OF TWO SEPARATE CONTIGUOUS LOTS IS DENIED THE USE OF ONE OF THOSE, *IE.*, IS ONE TAKEN BY THE OPERATION OF DEFENDANT TOWNSHIP ZONING ORDINANCE AND PRIVATE ROAD ORDINANCE BY RESTRICTING THE USE OF ONLY ONE PARCEL AS A SINGLE FAMILY RESIDENTIAL SITE.

The action of the Brandon Township Zoning Board of Appeals and the Township of Brandon requiring Plaintiffs to seek a variance to its Zoning Ordinance and Private Road Ordinance and then denying a variance, mean the Plaintiffs may only use their two (2) parcels for one building site. It has been agreed by Stipulated Facts that each lot of Plaintiffs' meets or exceeds all zoning requirements, except the road frontage ordinance requiring sixty-six (66) feet for a private road for more than one home. Brandon Township Zoning Ordinance, Section 5.06 provides:

"15.056 Sec. 5.06. ONE LOT, ONE BUILDING.

> In Single-Family Residential Districts, only one (1) principal building shall be placed on a lot of record with

> the exception of parcels of record which may be so arranged or subdivided as to provide for one (1) or more principal buildings when the land area allocated to each building is equal to or greater than the lot area required for the district and the building."

The Plaintiffs may only place one principal building or house on these two (2) lots because of the Defendants' denial of a variance. For years the Plaintiffs paid property taxes on two (2) separate but contiguous parcels, zoned separately for single family residential use. After the action by the Township and the Zoning Board of Appeals, the Plaintiffs were left with two (2) parcels, but only one building site. The Plaintiffs filed their Complaint in Circuit Court seeking to set aside the denial of variance, challenging the ordinances as unconstitutional and seeking a court determination that the Township had "taken" their property without just compensation. The Fifth (5th) Amendment of the United States Constitution provides:

> "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation."

and Article 10, Section 2 of the Michigan Constitution of 1963 provides:

> "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

The Plaintiffs were forced to sue in Circuit court for the "taking" of their property by Defendant Township. The Circuit Judge and Court of Appeals agreed with Plaintiffs and awarded them temporary damages and enjoined the enforcement of the Defendants' Ordinance requiring a sixty-six (66) foot wide private road to access Plaintiffs' two (2) parcels.

In analyzing a "taking" claim, this Honorable Court has held:

> "Land use regulation can effect a taking if it 'does not substantially advance legitimate state interests or denies an owner economically viable uses of his land.' " *Keystone Coal Association* v. *DeBenedictis*, 480 US ____, 94 L Ed 2d 472, 488 107 S Ct 1232 (1987). *Agins* v. *Tiburon*, 447 US 255, 260, 651 Ed 2d 106, 100 S Ct 2138 (1980).

In *Agins*:

> "The determination that governmental action constitutes a taking is in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest . . . necessarily requires a weighing of private and public interests." *Keystone, supra,* at 493; *Agins, supra,* at 106.

The areas of inquiry for judicial examination of governmental acts to decide a "taking" question are determined:

> "By engaging in essentially ad hoc, factual inquiries that have identified several factors — such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action — that have particular significance." *Kaiser Aetna* v. *United States*, 444 US 164, 175, 62 L Ed 2d 332, 100 S Ct 383 (1974), *Keystone, supra,* at 494.

To these inquiries are added the rulings in *First Lutheran Church* v. *Los Angeles County*, 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378 (1987); and *Nollan* v. *California Coastal Commission*, 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141 (1987). In *First Lutheran*, this Honorable Court held that a regulatory taking could amount to a "taking" of property in the constitutional sense; and a temporary regulatory taking would qualify as a "taking" triggering the demands of the just compensation clause.

A) Denial of economically viable use of property: This first prong of the *Agins* test has been violenced by Defendants-Appellees' treatment of the issue. The Plaintiffs contend and the Trial Court and Court of Appeals agreed, these were two (2)

separate parcels. The Stipulated Facts show the Plaintiffs purchased the two (2) parcels at separate times. Thus, the Plaintiffs contend the issue of the quantity of this property should be determined as stipulated — two (2) separate parcels. *Penn Central Transportation Co.* v. *New York City*, 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646 (1978) is distinguishable because Penn Central was utilizing one parcel of property where Grand Central Station was located. That one parcel was being utilized by Penn Central as zoned. The controversy in *Penn Central* was not over use as zoned, but a request for more intensive use by Penn Central. Penn Central could have submitted a less intensive plan, or sold its air rights to other parcels. In the case at bar, the Plaintiffs may not use one complete parcel as zoned or transfer their land rights to another parcel. The Plaintiffs may not build a single family home on each parcel as zoned.

In *Agins, supra,* the area of inquiry also concerned one parcel of property, five (5) acres, purchased by Plaintiffs. The issue was amount of density on that one parcel of property. The Plaintiffs in *Agins* could still utilize their whole parcel as zoned, the only question was the number of single family homes to be placed on the parcel. In neither *Penn Central* or *Agins* did the Plaintiffs ever submit plans or revised plans to determine where the threshold of a taking would occur. In the case at bar, the facts are quite simple: two building permits were requested by Plaintiffs for two lots.

Under *Keystone* rationale, the Petitioners contend they have lost the full use of one parcel as zoned. The Plaintiffs lost the use of one parcel through the Defendants' ordinances which destroyed their reasonable investment backed expectations. Had Plaintiffs desired only one house to be built, they could have purchased only one lot. Had Plaintiffs wanted to combine the two lots to one building site, they had ample opportunity to do so. Under *Keystone*, by looking at the nature of the property involved, the Plaintiffs have been denied the economically viable use of one separate parcel of property. Defendants-Appellees attempt to lump both parcels together does not square with the facts of this

case or the law of "taking". Under *Keystone*, the land use regulation took less than 2% of Plaintiff's coal. In the case at bar, Defendants-Appellees' regulation takes 100% use of one parcel as zoned. Under Defendants-Appellees' theory, Plaintiffs lose 50% of Plaintiffs' property. This under *Keystone* and *Nollan* still amounts to a taking. In *Nollan*, this Honorable Court found the requirement of a ten (10) foot easement to be a "taking" and constitutionally impermissible. As successfully argued before the Trial Court and Court of Appeals, the facts in the case at bar exceed the "economic viability test" of *Keystone* and *Nollan*. *Keystone* found no taking where only 2% of the property was affected; *Nollan* found a taking where a ten (10) foot easement was involved.

B) Substantially advanced legitimate state interests: The Plaintiffs successfully argued before the Trial Court and Court of Appeals the Township's Private Road Ordinance was a zoning ordinance and a police power ordinance. The Private Road Ordinance is a zoning ordinance because the width of a private road right-of-way, sixty-six (66) feet, was established in the Zoning Ordinance; Brandon Township Zoning Ordinance 15.057.5. No where in the Zoning Ordinance is the term "private road" defined or given any standard other than the sixty-six (66) foot width. The Private Road Ordinance adopted by Brandon Township in February, 1977, refers to the Brandon Township Zoning Ordinance and provides the standards and definitions for private roads.

Assuming a valid police power purpose for the Private Road Ordinance, this ordinance fails, as did the *Nollan* condition, because the ends advanced are not furthered by the justification for the prohibition. The Brandon Township Private Road Ordinance provides:

"30.024 Sec. 2.4. PRIVATE DRIVEWAY.

Private Driveway shall mean any piece of privately owned and maintained property which is used for vehicular traffic,

but is not open or normally used by the public. (emphasis added) (ord.no.42. eff.Feb.13,1977)

30.025 Sec. 2.5. PRIVATE ROAD.

Private Road shall mean a privately owned and maintained road, allowing access to more than one residence or place of business, *which is normally open to the public and upon which persons other than the owners located thereon may also travel.* The erection of such signs as, "Residents Only", or the like shall not be deemed to remove any roadway from the requirements of this Ordinance where said roadway is deemed to come within this Ordinance by the Supervisor of the Brandon Township Building Department or his designee. (Emphasis added) (ord. no.42 eff. Feb.13,1977)"

A private driveway may be in whatever condition or status a person wishes to allow. It is when a second residence is added, that a private driveway becomes a private road. Such classification is not reasonably related to the ends it seeks because a private driveway is a private driveway if not open or normally used by the public.

A common private driveway for these two houses will continue to be a driveway for these houses only and will not automatically become a private roadway because the key "normally used by the public" is not triggered. If the public does not use a private driveway for one house; what transfers a common private driveway for two houses into a road whether it be a public or private road. If in fact this is a private road "normally open to the public":

"It is axiomatic that the Fifth Amendment's just compensation provision is designated to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *First Lutheran, supra,* at 226.

The fact remains the public will not traverse a private driveway that dead ends into a lake, whether one or two houses be

at its end. The Defendant Township's Ordinance is defective on its face and as applied and does not relate to the ends it seeks.

This Honorable Court has recognized that

> "The Fifth Amendment's guarantee is designed to bar government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.
>
> "Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's refusal to pay for any losses approximately caused by it depends largely 'upon the particular circumstances in that case'." Citing *Penn Central, supra,* at 648.

The attempts by the Township to include the Michigan Subdivision Control Act, MCL 560.01, *et seq.;* MSA 26.430(101), *et seq.,* was not addressed by the Michigan Court of Appeals or the Trial Court below. The Subdivision Control Act does not apply in any event as there are only two parcels which were created from a lot split by separate predecessors in title, not five or more. This subdivision by deed is an appropriate and recognized method of dividing property in the State of Michigan and the split was acceded to and not objected to, by Brandon Township for many many years. The fact that two separate tax identification numbers were established by Brandon Township, and that those parcels were given separate legal descriptions coinciding with their separate tax identification numbers, indicate that this was no mere imaginary "line" drawn between a vacant acreage parcel, but in fact two separate and distinct parcels of property.

The property owner in this matter has not sought to join the parcels as one and in fact has resisted at the Township's earliest attempt to combine these parcels into one parcel. Further, as the total property is only six acres, unless Plaintiffs were to seek further splits, would the Michigan Subdivision Control Act be considered. In view of the fact that the Plaintiffs attempted no lot splits, and in fact that the parcels in question meet and exceed the

requisite Zoning Ordinance requirements, and the fact that Plaintiffs have treated them as separate parcels throughout the years, indicate that there are in fact two parcels of property in this matter. The cases cited by the Township to the Michigan Supreme Court as to the assemblage of unplatted property only is applicable where there are substandard lots which predate a Zoning Ordinance, those lots do not meet the current Zoning Ordinance requirements. In the case at bar, the two lots in question meet or exceed the Township Zoning Ordinance requirements and plus they predate the adoption of the Zoning Ordinance. In the case at bar, the Zoning Ordinance, as to lot size and the lots themselves, are in harmony, as opposed to the case cited by the Township wherein substandard minimally sized lots are concerned. The Michigan Attorney General Opinion cited by the Defendant Township further does not apply because the two parcels in question were not parcels or tracts under the Subdivision Control Act. Further, the belief of the Defendant Township that the assemblage requirement of the Michigan Plat Act is applicable in this matter is erroneous for the reason that had the Plaintiffs sought any further splits, the number of splits created to date would be relevant under the Subdivision Control Act, or had their predecessor in title considered any further splits on contiguous property, the splits for the Plaintiffs' parcels in question would be relevant. As we have neither of those situations in this matter, the Attorney General's Opinion is only relevant to show and illustrate how one counts splits or divisions of land subject to the Subdivision Control Act.

This litigation resulted from the direct action of the Brandon Township Zoning Board of Appeals telling Plaintiffs-Appellants that they could only have one building site instead of the two they bargained for years before.

Because of the unique factual circumstances in the case at bar, it will not open the floodgates to litigation as profferred by Defendant Township. There is no question that the harms done to the Bevans have been real and are caused directly by the action of the Brandon Township Zoning Board of Appeals. Should other

future Plaintiffs be similarly treated by municipalities in this State, it is hoped that this Honorable Court would find the relief and remedies in this matter as awarded by the Trial Court and Court of Appeals appropriate and sound policy for the State of Michigan consistent with Federal Taking Jurisprudence.

ARGUMENT

III WHETHER THE MICHIGAN SUPREME COURT IMPROPERLY INTERPRETED AND APPLIED THE BRANDON TOWNSHIP PRIVATE ROAD ORDINANCE TO THE FACTS OF THIS CASE IN LIGHT OF ESTABLISHED FEDERAL TAKING JURISPRUDENCE

As stated by this Court in *Penn Central, supra*, 648:

> "Indeed we have frequently observed that whether a particular restriction will be rendered invalid by the government's refusal to pay for any losses approximately caused by it, depends largely upon the particular circumstances in that case."

The Michigan Supreme Court now complains that the Court of Appeals improperly interpreted *Krompf* vs. *City of Sterling Heights*, 391 Mich 139, 163; 215 NW 2d 179 (1974), in failing to pay proper deference to the validity of the Township's ordinance. The Michigan Supreme Court claims that no evidence was introduced in the Stipulated Facts or at the Trial to show that the Private Road Ordinance standard of a sixty-six (66) foot right-of-way for a driveway serving two or more homes was a reasonable standard.

In response, the Trial Court and Court of Appeals agreed with Plaintiffs-Appellants' factual position that this accessway was nothing more than a driveway serving only two residences at the end of a dead end driveway abutting a lake. As the Plaintiffs-Appellants asked for an interpretation, the Trial Court finding that this easement was no more than a private driveway for two homes and did not become a private road under the very definitions of the Private Road Ordinance of Brandon Township, can

hardly be seen as error or a surprise that the Court of Appeals affirmed the Plaintiffs' interpretation of the Defendants' ordinance. The Trial Court was impressed with the fact that it was satisfied with the proposition that only two residential homes would be using this driveway. It is the contention of the Plaintiffs that any standards for building codes relative to driveways can be met by them in this twenty (20) foot easement. By the very facts of this case, the Township's claimed surprise that no standard was drawn by the Trial Judge is simply not the case. The Trial Judge and the Court of Appeals did not rule upon facts concerning three, four or five homes involved on one easement. The Decision was specifically limited to these facts, that is, two homes on one accessway easement. The Trial Court found and the Court of Appeals affirmed that this easement was nothing more than a private driveway, which could only possibly service two private homes and not the general public.

It was also argued successfully to the Trial Court that the alleged public health, safety and welfare difficulties to the Private Road Ordinance were not the same under the Private Driveway Ordinance. The Private Driveway Ordinance did not contain standards, and thus could be impassable at certain times of the year without concern to the Township because one residence was involved. On its face, this does not make any sense because the danger to the public is the same whether one house is involved or two homes are involved. Thus, the ordinance was given its proper validity, but because of its effects on the Plaintiffs' two parcels in question, was ruled invalid. This must be considered against the back drop of Plaintiffs prior arguments and Stipulated Facts as to what the actual effect of Defendant Township's regulation was upon the Plaintiffs' two parcels of property. The fact of the matter is, as the Plaintiffs stated in their Complaint, Count V, as to the Plaintiffs-Appellees two parcels of property, this Ordinance bore no reasonable relationship to the public health, safety and general welfare, and further, that there was a legitimate interpretive dispute as to whether or not this accessway was a private driveway serving two homes or a private road under the Township ordinance.

Further, the Township failed to follow its own ordinance in determining whether or not the drive would be normally used by members of the public. It has been Plaintiffs' contention throughout that this driveway accessing two private homes and ending at a lake would not become a private road under any circumstance by the mere addition of the second house. Again, the facts in this case are very specific, we are very specific, we are not concerned about a larger parcel of property, we are concerned about an access easement for only two parcels of contiguous property.

Plaintiffs-Appellants also argued that as this Private Road Ordinance was a hybrid zoning public health and welfare ordinance, that the prior existing easement should be considered a prior non-conforming usage, which was not being expanded by the Plaintiffs-Appellants, as the easement always served the two properties and the two properties alone. It is the contention of Plaintiffs-Appellants that the Trial Court and Court of Appeals had adequate basis in the Stipulated Facts and the arguments of counsel to be aware of the exact ramifications of the Township's Private Road Ordinance upon the Plaintiffs' two parcels in question. When looked in the light of the facts in this case and the effect of the facts upon the property in question, no reasonable court could determine any other rulings but the ones decided by the Trial Court and Court of Appeals below.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari to the United States Supreme Court from the Michigan Supreme Court should be issued and the case set for plenary review.

COLLEEN V. RONAYNE
Counsel of Record for Petitioners
THOMAS J. RYAN, P.C.
2055 Orchard Lake Road
Sylvan Lake, Michigan 48320
(313) 334-9938

December 4, 1991

APPENDICES

Opinion of the Michigan Supreme Court

SYLLABUS

Michigan Supreme Court
Lansing, Michigan 48909

Chief Justice
Michael F. Cavanagh

Associate Justices
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

BEVAN v BRANDON TOWNSHIP

Docket No. 86358. Argued March 6, 1991 (Calendar No. 2). Decided September 9, 1991.

William and Wava Bevan, owners of two adjoining parcels of property in Brandon Township, accessible only by way of a narrow easement over a neighbor's land, brought an action in the Oakland Circuit Court against the township, challenging a zoning ordinance restricting the number of houses that may be built on their property because of the nonconforming private access road. Relief was sought on stipulated facts under US Const Ams V and XIV, Const 1963, art 1, § 17 and art 10, § 2, and 42 USC 1983. The court, James S. Thorburn, J., declared that the ordinance, as applied, amounted to a temporary taking and enjoined its enforcement. The Court of Appeals, Shepherd, P.J., and Murphy and T. Gillespie, JJ., affirmed (Docket No. 103711). The township appeals.

In an opinion by Justice Griffin, joined by Justices Levin, Brickley, Riley, and Mallett, the Supreme Court *held:*

The township's regulation, as applied to the plaintiffs' property, does not amount to a regulatory taking without just compensation.

1. Government taking of private property without just compensation is prohibited by US Const, AM V and Const

1963, art 10, § 2. Zoning regulations may amount to a taking if, as applied, they go too far in impairing a property owner's use of land. Generally, however, where a regulation promotes the health, safety, morals, or general welfare, it has been upheld even though it may adversely affect recognized property interests.

2. The property in question in this case, although comprised of two separate contiguous parcels, is to be considered as a whole for purposes of taking analysis. Its separate tax numbers and deeds are not controlling in determining whether enforcement of the ordinance would amount to a taking.

3. A zoning ordinance is presumed valid, and the burden of showing that there is no real or substantial relation to public health, morals, safety, or general welfare is on the challenger. In this case, the ordinance, on its face, is a legitimate exercise of the township's police power, providing for the safety of its citizens. The plaintiffs offered no competent evidence to overcome the presumption, to establish a vested nonconforming use, or to demonstrate a denial of the economically viable use of their property.

Chief Justice Cavanagh and Justice Boyle concurred in the result only.

Reversed.

176 Mich App 452; 440 NW2d 31 (1989) reversed.

Opinion of the Michigan Supreme Court

OPINION

Michigan Supreme Court
Lansing, Michigan 48909

Chief Justice
Michael F. Cavanagh

Associate Justices
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.

Filed September 9, 1991

WILLIAM BEVAN and WAVA BEVAN,
Plaintiff-Appellees,

v

TOWNSHIP OF BRANDON, a municipal corporation, and TOWNSHIP OF BRANDON BOARD OF APPEALS,
Defendants-Appellants,

No. 86358

BEFORE THE ENTIRE BENCH
GRIFFIN, J.

We must decide whether enforcement of a township ordinance which restricts the use of plaintiffs' land amounts in this case to an unconstitutional "taking" without just compensation. Plaintiffs own approximately six acres of undeveloped land which does not front on a public road. Their predecessor in title had divided the parcel into two continguous lots, each with its own tax description, and the lots were sold separately to plaintiffs. The only access to plaintiffs' property is an easement 20 feet wide and 290 feet long across a neighbor's land. Under township land-use ordinances adopted after plaintiffs acquired title, the land is zoned for single family homes, and one house may be built on the property. Plaintiffs are restricted from building two or more houses on the property unless access is made available over a road with a right of way width of at least sixty-six feet.

Because the access regulation in question serves a legitimate governmental interest and does not deny the owners economically viable use of their land, we conclude that enforcement does not effect an unconstitutional taking of plaintiffs' property. Accordingly, we reverse the decision of the Court of Appeals.

I

In the circuit court, the parties waived a trial and submitted the case for decision upon stipulated facts. A copy of the statement of stipulated facts, which was signed by the parties and accepted by the circuit judge, is appended to this opinion.

It is undisputed that the easement providing the only access to plaintiffs' property does not meet the minimum width requirement of the township ordinance applicable to a private road which serves two or more homes.[1] After their application for permits to build two houses on the property was rejected, plaintiffs sought a variance, or waiver of the requirement; however, it was denied on August 28, 1985, by the board of zoning appeals. Thereafter, in December 1986, plaintiffs commenced this lawsuit and complained that, as applied, the township's zoning scheme, and particularly the private road ordinance, denied them use of one lot in violation of the Fifth and Fourteenth Amendments of the United States Constitution as well as art 1, § 17 and art 10, § 2 of the Michigan Constitution. Plaintiffs sought relief under 42 USC

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[1] Brandon Township Ordinance No. 42, adopted in 1977, includes the following definition of a private road:

"§2.5. Private Road. Private Road shall mean a privately owned and maintained road, allowing access to more than one residence or place of business, which is normally open to the public and upon which persons other than the owners located thereon may also travel. The erection of such signs as, "Residents Only," or the like shall not be deemed to remove any roadway from the requirements of this Ordinance . . . ."

Section 7.1 of the same ordinance requires that the right-of-way for such a private road "shall be a minimum of sixty-six (66) in width."

1983, and they asked for a declaratory judgment holding the road ordinance unconstitutional.

In a brief written opinion, the circuit judge ruled that application of the road ordinance to plaintiffs' property "constitutes a regulatory taking and is confiscatory." After pointing out that plaintiffs had sought no compensation for a temporary taking, the court enjoined enforcement of the ordinance and awarded plaintiffs an attorney fee of $5,300.[2]

On appeal to the Court of Appeals, the decision of the lower court was affirmed. 176 Mich App 452; 440 NW2d 31 (1989). Reasoning that plaintiffs' property is "unquestionably two separate parcels," and that plaintiffs' easement "would be wide enough to accommodate emergency equipment," the panel concluded that the road ordinance "as applied to [plaintiffs'] property precludes its use for any purpose to which it is reasonably adapted" and "constitutes a regulatory taking of one of plaintiffs' two parcels." *Id.* at 464-465.

Thereafter, we granted leave to appeal. 436 Mich 881 (1990).

II

Both the Fifth Amendment of the United States Constitution[3] and art 10, § 2 of the Michigan Constitution[4] prohibit

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[2] The judge cited 42 USC 1988, which provides that reasonable attorney fees may be awarded to the prevailing party in a 42 USC 1983 action. The amount of the fee was in accord with the stipulation of the parties.

[3] US Const, Am V, provides in part:

"No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fifth Amendment is applied to the States through the Fourteenth Amendment. See, e.g., *Penn Central Trans Co* v *New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

[4] Mich Const 1963, art 10, & 2 provides in part:

governmental taking of private property without just compensation. In *Armstrong* v *United States*, 364 US 40, 49; 80 S Ct 1563; 4 L Ed 2d 1554 (1960), The United States Supreme Court stated that, the

"Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

As this Court has explained, speaking through Chief Justice Riley in *Electro-Tech, Inc* v *H F Campbell Co*, 433 Mich 57, 68; 445 NW2d 61 (1989),

"a taking may occur where a governmental entity exercises its power of eminent domain through formal condemnation proceedings, see, e.g. *Berman* v *Parker*, 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954) (Fifth Amendment taking), or where a governmental entity exercises its police power through regulation which restricts the use of property, see *Pennsylvania Coal Co* v *Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922) (this claim may be framed as a Fifth Amendment taking or as a Fourteenth Amendment 'due process' type taking)."

Zoning laws are a classic example of regulation that may amount to a "taking," if application "goes too far" in impairing a property owner's use of his land. *Pennsylvania Coal Co, supra* at 415. Generally speaking, however, zoning regulation has been upheld where it promotes the health, safety, morals, or general welfare even though the regulation may adversely affect recognized property interests.[5] As the United States Supreme

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"Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

[5] See, e.g., *Agins* v *Tiburon*, 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980); *Penn Central*, n 3 *supra; Nectow* v *Cambridge*, 277 US 183; 48 S Ct 447; 72 L Ed 842 (1928); *Village of Euclid* v *Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926); *Gackler* v *Yankee Springs Twp*, 427

Court has explained, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.

The Supreme Court has declared that "land-use regulation does not effect a taking if it " 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Nollan* v *California Coastal Comm*, 483 US 825, 834-835; 107 S Ct 3141; 97 L Ed 2d 677 (1987), citing *Agins* v *Tiburon*, 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980). Although the Supreme Court has provided little guidance regarding what it considers a legitimate state interest and the type of connection required between that interest and the regulation, *Nollan, supra* at 834, it has made clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains. *Keystone Bituminous Coal Ass'n* v *DeBenedictis*, 480 US 470, 497; 107 S Ct 1232; 94 L Ed 2d 472 (1987).

As previously noted, a taking claim may be framed as a violation of the Just Compensation Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. Alternatively, as Justice Brickley, dissenting, explained in *Electro-Tech*, *supra* at 94, a claim may be based on a denial of

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Mich 562; 398 NW2d 393 (1986); *Kirk* v *Tyrone Twp*, 398 Mich 429, 433; 247 NW2d 848 (1976); *Kropf* v *Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974).

substantive due process where a plaintiff is deprived of property rights "by irrational or arbitrary governmental action."[6]

We note, preliminarily, that this case was not presented and argued in the courts below as a substantive due process claim;[7] the rulings of the courts below focus only on plaintiffs' claim of a regulatory taking. In any event, we note the absence of record evidence to support a contention that enactment or enforcement of the ordinance in this case was a "deliberate and arbitrary abuse of power" aimed at these particular plaintiffs. Consequently, our review focuses on the question whether the lower courts erred in ruling that application of the challenged ordinance amounted to a "taking" without just compensation of plaintiffs' property.[8]

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[6] Under this approach, it must be shown that a regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid* v *Ambler Realty Co*, n 5 *supra* at 395.

As Justice Brickley explained in *Electro-Tech* at 94-95,

"In contrast to regulatory taking due process claim, . . . [a] substantive due process claim, . . . 'does not require proof that all use of the property has been denied. . . .' Rather, 'the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process.' " (Citations omitted.) See also *Id.* at 76, n 21.

[7] "It is not enough to note that [the petitioners] rely on the Due Process Clause of the Fourteenth Amendment, for that Clause is the course of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. . . . Second, it contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.' . . . Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards." *Daniels* v *Williams*, 474 US 327, 337; 106 S Ct 662; 88 L Ed 2d 662 (1986) (Stevens, J., concurring)."

[8] We do not overlook that plaintiffs' § 1983 claim falls short of compliance with finality (ripeness) requirements laid down in *Williamson Co Regional Planning Comm* v *Hamilton Bank of Johnson City*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985), and applied by this Court in *Electro-Tech*, *supra*. In

However, before reaching that question, we must consider a subissue: whether for purposes of a "taking" analysis the property of plaintiffs is to be viewed as a whole, or as two separate lots.

III

Noting that the two lots were purchased at different times and that each lot carried its own tax identification number, the Court of Appeals viewed the property as "unquestionably two separate parcels." 176 Mich App 464. The panel reasoned that one of the two lots had been "taken," since plaintiffs were permitted to build only one house on their land.

As a general rule, a person's property should be considered as a whole when deciding whether a regulatory taking has occurred. 1 Rathkopf, Zoning and Planning, § 6.07(5), p 6-45.

Since the purposes of a taking analysis it is necessary to compare the value "taken" with the value that remains, "one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Keystone, supra* at 497.

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addition to requiring that the "initial decisionmaker [arrive] at a definitive position on the issue that inflicts an actual concrete injury," 473 US 193, the *Williamson* Court declared that

"if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until it has used the procedure and been denied just compensation.*" *Id.* at 195 (emphasis added).

In this case, after plaintiffs' request for a variance was denied by the township's board of zoning appeals, plaintiffs had taken no action for sixteen months when they filed this lawsuit. Although plaintiffs have included a state inverse condemnation claim in this action, obviously, it cannot be said that they "used the [state] procedure and been denied just compensation." Accordingly, consistent with *Electro-Tech*, plaintiffs' § 1983 claim was not ripe for adjudication. Of course, this point is not dispositive since plaintiffs also claim violation of the state constitution.

Specification of the appropriate unit of property under consideration was at the heart of two significant United States Supreme Court decisions dealing with the issue of regulatory taking. *Keystone, supra;* and *Penn Central Trans Co* v *New York City,* 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Contrary to the position taken in this case by the Court of Appeals, the Supreme Court has declined to view an owner's property as divisible for purposes of a "taking" analysis. In *Penn Central,* owners of the New York City's Grand Central Terminal challenged application of the city's Landmarks Preservation Law which prevented them from constructing a multistory office building atop an existing structure. Rejecting the owners' argument that the law deprived them of any gainful use of the airspace above the terminal, and that regardless of the value of the remainder of the property, the city had "taken" the airspace thereby requiring just compensation, the Court observed:

"[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable . . . *'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.* In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the *parcel as a whole* . . . ." 438 US 130-131.[9] (Emphasis supplied.)

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[9] See also *Multnomah Co* v *Howell,* 9 OR App 374, 379-380; 496 P2d 235 (1972) ("The reasonableness of a zoning ordinance must be tested by its effect on the whole of the [landowner's] contiguous property, not simply a portion thereof.")

Cf. *American Savings & Loan Ass'n* v *Marin Co,* 653 F2d 364 (CA 9, 1981), where the court held that contiguity of lots under the same ownership does not automatically create a single parcel for taking purposes. In that case, the plaintiff's property was covered by two different zoning designations which could divide it into discrete segments. The court suggested that the "whole

Additional guidance was provided in *Keystone Coal Ass'n, supra,* where the Court explained that " '[w]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.' " 480 US 497. Writing for the Court, Justice Stevens explained:

"Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. . . . There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property." 480 US 498.

According to the Court, the "taking" analysis does not turn on the state's recognition of a separate estate within the owner's property, or whether state law allows the separate sale of a segment of the property. *Id.* at 500. "It is clear," wrote Justice Stevens, "that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.*

This Court has recognized that contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances, despite the owner's division of the property into separate, identifiable lots. In *Korby* v *Redford Twp,* 348 Mich 193; 82 NW2d 441 (1957), the owners of numerous contiguous lots sought to enjoin enforcement of a township zoning ordinance restricting use of the property to single-family residences. The owners contended, inter alia, that the ordinance was unreasonable because their lots were platted twenty feet in width, and as such, were not wide enough for single-family residences. This Court ruled that division of the property, "is not a fact or circumstance which affects or detracts

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parcel" approach enunciated in *Penn Central* is limited to cases where all of the property is subject to the challenged zoning ordinance, as it is here.

from the reasonableness of the classification. If it were held to be so, the result would be that it would be competent for landowners to perpetually defeat future zoning restrictions by crisscrossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others. *The test of reasonableness may not be distorted or thwarted by any such artificial device.*" 348 Mich 198.[10] (Emphasis added.)

In the case before us, it is noteworthy that the separate tax numbers and deeds identifying the parcel as two lots were sought by the plaintiffs' predecessor in interest. Whether Michigan law allows a property owner to divide his land into separate parcels is not controlling for purposes of a taking analysis. *Keystone Coal, supra.* "Artificial device [s]," such as tax identification numbers and separate deeds — analogous to the plat lines in *Korby* — are not controlling in determining whether enforcement of the ordinance in this case would amount to a taking.[11]

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[10] It is also observed that when the government directly condemns a portion of a parcel of land for public use, the owner often seeks just compensation on the basis of diminution of value to his remaining land. In this regard, property owners often assert that their remaining land, even if physically separated from the portion taken, should be considered as one parcel. While the owner is not entitled to recover for damage to separate and independent parcels of land which he may happen to own in the same neighborhood, a parcel of land is not considered separate and independent merely because it was bought at a different time and separated by an imaginary line, or even that the parcels are separated by a highway, street, or alley. 27 Am Jur 2d, Eminent Domain, § 315, 134-135. Nor does the fact that vacant, undeveloped land is "made up of a number of government subdivisions or sections . . . alone prevent its being treated as an entirety in the award of damages for a taking of part of it." *Id.*, § 317, p 139.

[11] A zoning ordinance which requires the merger of contiguous substandard lots for development purposes may be found unconstitutional if it results in unlawful spot zoning. See *SBS Builders* v *Madison Heights*, 389 Mich 323; 206 NW2d 437 (1973), where this Court struck down an ordinance necessitating the merger which applied only to a minute portion of the city, and where it appeared that the plaintiffs "may well be" the only persons affected by the ordinance.

Accordingly, we decline to apply a taking analysis only to one of plaintiffs' lots and thereby "attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central, supra* at 130. Instead, we conclude that plaintiffs' land, and the full bundle of property rights associated with it, must be viewed in its entirety.

IV

We turn now to the question whether enforcement of the township's ordinance amounts to an unconstitutional regulatory taking. As already indicated, that inquiry requires us to consider whether the challenged ordinance substantially advances a legitimate governmental interest and whether it denies the owners economically viable use of their land. *Nollan, supra*, 483 US 825.[12]

A

While all of the legitimate state interests that may justify zoning have not been identified, the United States Supreme Court has indicated "that a broad range of governmental purposes and regulations satisfies these requirements." *Nollan* v *California Coastal Comm, supra*, at 834-835.

Meanwhile, the approach of this Court in passing on constitutional challenges to zoning ordinances has been well established. First of all, the validity of the ordinance is presumed.

In this case, the property in question consists of two contiguous lots under the same ownership and subject to a single zoning scheme. No evidence of "spot zoning" has been produced to show that plaintiffs' particular property has been, in effect, singled out and treated differently from all other property to accomplish a purpose that is being ignored elsewhere in the township.

[12] It is significant that in this case the challenged regulation does not require the property owner to transfer land to the government without compensation. See *Nollan* v *California Coastal Comm, supra*. Rather, the ordinance regulates the scope of development on property with limited access.

Kropf v *Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974).[13] As we explained in *Austin* v *Older*, 283 Mich 667, 674; 278 NW2d 727 (1938):

"It is elementary that every intendment is in favor of the constitutionality of an ordinance and *plaintiff has the burden of showing that it has no real or substantial relation to public health, morals, safety or general welfare.* Zoning ordinances are constitutional in principle as a valid exercise of the police power." (Emphasis added.)

We elaborated on the plaintiff's burden in *Kropf, supra*, where it was stated that a zoning ordinance is presumptively valid " 'unless the constitutional objections thereto are supported by *competent evidence* or appear on their face.' " 391 Mich. 156. (Emphasis added.)

Brandon Township's purpose in enacting the private road ordinance and applying it to plaintiffs' property is found in the preamable of that ordinance:

"It is recognized that such standards are necessary because of the need for road services adequate to provide year around access by fire, police, and like emergency vehicles. It is further recognized that if roads are not constructed in accordance with certain minimum standards, such roads frequently become impassable . . . and otherwise pose a threat to the health, safety and welfare of the residents located along the roadway, as well as those other residents who would find use of the roadway essential." Ordinance No 42.

In support of the validity of the ordinance, the township attorney explained the relation between the ordinance and the governmental purpose.

"Your Honor, the Township in this kind of situation is between a rock and a hard place.

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[13] See also *Kirk* v *Tyrone*, n 5 *supra*.

"We're charged with the maintenance and the welfare of our citizens. We've decided based on our experience with private roads that we have to be sure the people have passable access to the property where fire equipment can get in, emergency equipment can get in.

"This is a lake front parcel. The first time that a piece of emergency equipment can't get in there when there's a child drowning or there's a fire, the township will not only be criticized, they'll probably be sued.

* * *

"But when there's more than one dwelling involved, public interest becomes involved. And there's more than one dwelling involved in this situation . . . ."

On its face, the township's zoning ordinance is a legitimate exercise of its police power to provide for the safety of its citizens by requiring that access to residential property be of a width which allows for the entry and exit of police cars, ambulances and fire trucks.[14] The township legislatively determined that the public interest requires a wider access where it must serve, and be maintained by, two or more residences and is no longer under the sole control of one landowner.

On the other hand, the Court of Appeals made its own determination that the existing twenty-foot easement would be wide enough to accommodate emergency equipment for two single-family dwellings. *Bevan, supra,* 176 Mich App 464. In so concluding, the panel erred. Although *Kropf* requires it, plaintiffs provided no "competent evidence" to support such a determination. Certainly, a mere assertion by plaintiffs that the existing easement is wide enough to accommodate emergency vehicles

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[14] The state has given defendant the authority to enact zoning ordinances pertaining to roadway standards through the township rural zoning act. MCL 125.271; MSA 5.2963(1). See also *People* v *Sell,* 310 Mich 305, 315-316; 17 NW2d 193 (1945), for a detailed description of "police power."

does not, standing alone, overcome the presumption that the legislatively determined sixty-six foot access width requirement advances a legitimate governmental interest.[15]

Plaintiffs also complain that the ordinance was applied without consideration of circumstances surrounding the property before adoption of the ordinance—circumstances under which plaintiffs had a right to construct two residences on the property.[16] Essentially, plaintiffs claim a vested nonconforming use for their property.

As we explained in *Gackler* v *Yankee Springs Twp,* 427 Mich 562, 573-574; 398 NW2d 393 (1986),

" 'A prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance.' A zoning ordinance cannot operate to oust the property owner of his vested right even though the ordinance is reasonable. 'An ordinance requiring immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained . . . .' "

In order for a nonconforming use of land to vest, actual construction on the site must have begun before the zoning regulation is adopted. Application of a zoning ordinance does not amount to a taking where the nonconforming use of the property

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[15] In a related argument, plaintiffs contend that the ordinance is unreasonable because it defines a private road as one "open to the public" and the use of plaintiffs' easement by the public will be minimal. However, we note that the operative language of the ordinance is whether access is provided to more than one residence, and the ordinance specifically states that a private road may be restricted in its use to residents only.

[16] These circumstances are distinguishable from those cases where a preexisting zoning ordinance was challenged by a landowner who purchased property with knowledge of the restrictions and the Court denied relief. *Johnson* v *Robinson Twp,* 420 Mich 115; 359 NW2d 526 (1984); *Kropf, supra.* However, it does not follow that undeveloped land purchased when there was no regulation will be free thereafter from compliance with all later restrictions on land use.

"rests solely within the owner's contemplation." *Id.* at 578. In *Gackler,* we ruled that

"[t]o establish a nonconforming use, 'there must be work of a "substantial character" done by way of preparation for an actual use of the premises.' The actual use which is nonconforming must be apparent and manifested by a tangible change in the land, as opposed to intended or contemplated by the property owner. In this regard, preliminary operations such as ordering of plans, surveying the land, and the removal of old buildings are insufficient to establish a nonconforming use. *The test in each case is not whether a little or a lot has been spent in reliance upon the past zoning classifications, but, rather, 'whether there has been any tangible change in the land itself by excavation and construction.'* " 427 Mich 574-575 (citations omitted, emphasis added).[17]

The township's private road ordinance was enacted in 1977, and plaintiffs did not apply for building permits until 1985, eight years after the ordinance became effective. A review of the record, including the statement of stipulated facts, makes clear that plaintiffs have not borne the burden of showing that work of a "substantial nature" toward construction of two residences had taken place prior to adoption of the ordinance. Where building permits have been applied for, but have not been issued, vested rights are not acquired, even though significant sums may have been expended by the applicant. *Franchise Realty Interstate Corp* v *Detroit,* 368 Mich 276; 118 NW2d 258 (1962). Accordingly, plaintiffs acquired no vested right to develop the property free of the ordinance.

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[17] See also *City of Lansing* v *Dawley,* 247 Mich 394; 225 NW 500 (1929); *Sandenburgh* v *Michigamme Oil Co,* 249 Mich 372; 228 NW 707 (1930); *Bloomfield Twp* v *Beardslee,* 349 Mich 296; 84 NW2d 537 (1957); *Franchise Realty Interstate Corp* v *Detroit,* 368 Mich 276; 118 NW2d 258 (1962); *Expert Steel Co* v *City of Clawson,* 368 Mich 619; 118 NW2d 815 (1962); *Detroit Edison Co* v *City of Wixom,* 382 Mich 673; 172 NW2d 382 (1969); *Dingeman Advertising, Inc* v *Algoma Twp,* 393 Mich 89; 223 NW2d 689 (1974); *Schubiner* v *West Bloomfield Twp,* 133 Mich App 490; 351 NW2d 214 (1984).

B

Whether a zoning ordinance deprives an owner of economically viable use of his property requires consideration of such factors as the economic effect of the regulation and the extent of its interference with reasonable investment-backed expectations. *Keystone, supra* at 495.

The United States Supreme Court has ruled that a mere diminution in property value which results from regulation does not amount to a taking, *Penn Central, supra,* 438 US 131, and that a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned.[18]

This Court has stated:

"[A]n aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted." *Kropf, supra,* 391 Mich 162-163.[19]

In the past, this Court has utilized two factors in determining whether zoning regulation effects a taking. The owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned. *Kirk* v *Tyrone Twp,* 398 Mich 429, 444; 247 NW2d 848 (1976).[20] In *Kirk,* an owner whose land was zoned for single family dwellings sought, and was denied, rezoning to a classification that would permit development of a mobile home park. He complained of unconstitutional confiscation, asserting that the higher cost of developing his land for on-site homes

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[18] A comparison of values before and after a regulation becomes effective is relevant in determining whether the regulation is so onerous as to constitute a "taking," but is by no means conclusive. *Goldblatt* v *Hempstead,* 369 US 590; 82 S Ct 987; 8 L Ed 2d 130 (1962). See also *Keystone, supra,* 480 US 497.

[19] See also *Gackler* v *Yankee Springs Twp, supra.*

[20] *Spanich* v *Livonia,* 355 Mich 252; 94 NW2d 62 (1959); *Brae Burn, Inc* v *Bloomfield Hills,* 350 Mich 425; 86 NW2d 166 (1957).

precluded its use as zoned. The *Kirk* Court noted a lack of evidence that the land could not be developed with on-site homes or that no market for single-family residences existed. Finding that the zoning ordinance as applied did not effect a taking, this Court explained:

"Although there is no doubt the subject land's value as a mobile home park exceeded its value as residential property, it still was worth a great deal as zoned. A showing of confiscation will not be justified by showing a disparity in value between uses." *Id.* (Citations omitted.)

In the present case, plaintiffs' property is zoned for single-family dwellings, but the ordinance under challenge limits the number of homes that may be built unless there is an access right-of-way that is sixty-six feet wide. It is significant for purposes of a taking analysis that plaintiffs are allowed, under the ordinance, to build one home on their property. Accordingly, plaintiffs have not demonstrated that the ordinance renders their property unsuitable for use as zoned. The ordinance therefore does not preclude plaintiffs' use of the property "for any purposes to which it is reasonably adapted." *Kropf, supra*, 391 Mich 163.

Nor has it been shown that plaintiffs' property would be unmarketable if it were developed with a single residence in accordance with the ordinance. Although the Court of Appeals concluded that "plaintiffs' attempts to sell the property have been unsuccessful," 176 Mich App 464, the record reflects only that one attempt to sell to the Department of Natural Resources was unsuccessful. No evidence was provided, and no factual findings were made, concerning the extent of the effort or methods used in attempting to sell the property. The record does not reflect the price at which the property was offered, or the value of comparable lands, or any other evidence that would justify a conclusion that the property as zoned is unmarketable. Although there may be a disparity between the value of the land with a single home as compared to two homes, there is no record evidence of the extent

of that disparity. As we have said, "A showing of confiscation will not be justified by showing a disparity in value between uses." *Kirk, supra* at 444; *Brae Burn, Inc* v *Bloomfield Hills*, 350 Mich 425, 433; 86 NW2d 166 (1957).

V

Quite simply, in this case plaintiffs have not borne the burden of proof in any respect with regard to their allegations that a regulatory taking has occurred. The presumption of validity attached to defendant's ordinance remains undisturbed and there has been no demonstration that plaintiffs have been denied the economically viable use of their property. See *Nollan, supra*.

Accordingly, we hold that the township's regulation, as applied to plaintiffs' property does not amount to a regulatory taking without just compensation, and the decision of the Court of Appeals is reversed.

/s/ Michael F. Cavanagh
/s/ Patricia J. Boyle

/s/ Robert P. Griffin
/s/ Conrad L. Mallett, Jr.
/s/ Dorothy Comstock Riley
/s/ Charles L. Levin
/s/ James H. Brickley

Appendix
Statement of Stipulated Facts

"Plaintiffs purchased this lakefront property in two parcels by separate land contracts on September 20, 1954, and June 11, 1964 and took title in 1964 and 1970. Thereafter, Wave Bevan, formerly Wava Warner, transferred title to herself and William Bevan, her husband.

"Deeds creating the above transfers reserve an easement 20 feet wide from the nearest public highway to the parcel, and such deeds predate the Zoning Ordinance and Private Road Ordinance, hereafter discussed.

"The property does *not* have frontage on any public roadway. The only access is the easement.

"In 1974, Brandon Township adopted its Zoning Ordinance. . . . Other than those street frontage requirements, the parcel, as divided, meets the Zoning Ordinance requirements for two (2) buildable sites.

"In 1977, Brandon Township adopted a Private Road Ordinance. That ordinance is Brandon Township Ordinance No. 42, ...

"At the time that Wava Bevan purchased the parcel, her predecessor in interest had already divided the parcel, which parcel is approximately six (6) acres, into two (2) tax descriptions.

"The easement that exists for the purpose of serving the parcel does not meet the minimum private road requirement as set forth in Article VII, Section 7.1 of the Brandon Township Private Road Ordinance. . . . The Bevans, seeking to obtain two (2) building permits on their parcel, one (1) for each of the tax descriptions, applied to the Township Board of Zoning Appeals for a variance with regard to the road width (from the required 66′ to 20′, the amount they owned) so as to permit them to build

a private road on the parcel, which private road would then entitle them to two (2) building permits. Section 2.5 of the Brandon Township Private Road Ordinance requires a private road when the roadway is going to service more than one (1) residence. The variance would not be necessary if the Bevan's [sic] sought to build only one house because the Bevans would be entitled to one permit, and could obtain that at any time.

"The Brandon Township Zoning Board of Appeals denied the request for a variance with regard to the width requirement. As a result of that denial this Complaint was filed. The first two (2) Counts of the Complaint deal with the appeal, and a request for delayed appeal from the action of the Zoning Board of Appeals. The next three Counts of the Complaint deal with 'Violation of Constitutional Rights,' 'Civil Rights Act' and 'Declaratory Judgment: Township of Brandon's Private Road Ordinance as Unconstitutional.'

"Since the Board of Appeals action, the Bevans have tried unsuccessfully to sell the property to the Department of Natural Resources.

"The access easement is unimproved and there has been no construction on the building sites. (See Minutes of Board of Appeals, attached to Plaintiff's Complaint and accepted by Defendant.)

"Bevans' out of pocket damages to date are Five Thousand One Hundred Twenty Five ($5,125,000) Dollars attorney fees, costs of One Hundred Seventy ($170.00) Dollars for expert witness fees, Fifty ($50.00) Dollars court costs, and Sixteen ($16.00) Dollars subpoena fees for a total of Five Thousand Three Hundred Sixty One ($5,361.00) Dollars." (Emphasis in original.)

Opinion of Court of Appeals

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM BEVAN and WAVA BEVAN,
Plaintiffs-Appellees,

v

TOWNSHIP OF BRANDON, a municipal corporation, and TOWNSHIP OF BRANDON BOARD OF APPEALS,
Defendants-Appellants,

April 17, 1989
No. 103711

Before: Shepherd, P.J., and Murphy and T. Gillespie,* JJ.

MURPHY, J.

Defendants appeal as of right from a circuit court judgment in plaintiffs' favor permanently enjoining defendants from applying the township's private road ordinance relative to plaintiffs' property and awarding plaintiffs $5,300 in attorney fees. We affirm.

The lower court decided this matter on the following stipulated facts:

> "Plaintiffs purchased this lakefront property in two parcels by separate land contracts on September 20, 1954, and June 11, 1964 and took title in 1964 and 1970. Thereafter, Wava Bevan, formerly Wava Warner, transferred title to herself and William Bevan, her husband.
>
> "Deeds creating the above transfers reserve an easement 20 feet wide from the nearest public highway to the parcel, and such deeds predate the Zoning Ordinance and Private Road Ordinance, hereafter discussed.

* Circuit judge, sitting on the Court of Appeals by assignment.

Opinion of Court of Appeals

"The property does *not* have frontage on any public roadway. The only access is the easement.

"In 1974, Brandon Township adopted its Zoning Ordinance. A copy of the relevant section of that ordinance (Section 5.07 *Required Street Frontage*) is attached hereto and incorporated herein. Other than those street frontage requirements, the parcel, as divided, meets the Zoning Ordinance requirements for two (2) buildable sites.

"In 1977, Brandon Township adopted a Private Road Ordinance. That ordinance is Brandon Township Ordinance No. 42, a copy of that ordinance is attached hereto and incorporated herein.

"At the time that Wava Bevan purchased the parcel, her predecessor in interest had already divided the parcel, which parcel is approximately six (6) acres, into two (2) tax descriptions.

"The easement that exists for the purpose of serving the parcel does not meet the minimum private road requirement as set forth in Article VII, Section 7.1 of the Brandon Township Private Road Ordinance. (See attached) The Bevans, seeking to obtain two (2) building permits on their parcel, one (1) for each of the tax descriptions, applied to the Township Board of Zoning Appeals for a variance with regard to the road width (from the required 66′ to 20′, the amount they owned) so as to permit them to build a private road on the parcel, which private road would then entitle them to two (2) building permits. Section 2.5 of the Brandon Township Private Road Ordinance requires a private road when the roadway is going to service more than one (1) residence. The variance would not be necessary if the Bevan's sought to build only one house because the Bevans would be entitled to one permit, and could obtain that at any time.

Opinion of Court of Appeals

"The Brandon Township Zoning Board of Appeals denied the request for a variance with regard to the width requirement. As a result of that denial this Complaint was filed. The first two (2) Counts of the Complaint deal with the appeal, and a request for delayed appeal from the action of the Zoning Board of Appeals. The next three Counts of the Complaint deal with 'Violation of Constitutional Rights', 'Civil Rights Act' and 'Declaratory Judgment: Township of Brandon's Private Road Ordinance as Unconstitutional'.

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"The access easement is unimproved and there has been no construction on the building sites. (See Minutes of Board of Appeals, attached to Plaintiff's Complaint and accepted by Defendant.)

"Bevans' out of pocket damages to date are Five Thousand One Hundred Twenty Five ($5,125.00) Dollars attorney fees, costs of One Hundred Seventy ($170.00) Dollars for expert witness fees, Fifty ($50.00) Dollars court costs, and Sixteen ($16.00) Dollars subpoena fees for a total of Five Thousand Three Hundred Sixty One ($5,361.00) Dollars."

After brief oral argument by counsel, the court took the matter under advisement and thereafter issued an opinion which concluded that the enactment and enforcement of the ordinance relative to plaintiffs' property constituted a temporary, regulatory taking of property without compensation, and that it was confiscatory. The court also noted the plaintiffs were not seeking any compensation for the temporary taking of their property. However, the parties stipulated to reasonable attorney fees, if awarded, as being $5,300. The court then awarded plaintiffs their attorney fees as a proper incident to a 42 USC 1983 claim and under

Michigan's Uniform Condemnation Procedures Act, MCL 213.66(2); MSA 8.265(16)(2).

Defendants' first contend that the trial court erred in granting relief under a federal statute when plaintiffs failed to exhaust all of their state remedies. We disagree.

The township zoning board of appeals rendered its decision on August 28, 1985, denying plaintiffs' request for variance. A decision by a board of appeals is final. MCL 125.293a; MSA 5.2963(23a). Moreover, that statute provides that a person having an interest affected by the zoning ordinance *may* appeal to the circuit court. *Id.* Therefore, while plaintiffs' could have immediately appealed to the circuit court, they were not required to do so as a condition to filing their several count complaint. We also note that plaintiffs never had to seek a variance in order to challenge the zoning ordinance. Plaintiffs' taking challenge is separate and distinct from seeking a variance. A variance is simply an authorization to a property owner to depart from the literal requirement of zoning regulations in utilization of his property in cases in which strict enforcement of the zoning regulations would cause undue hardship. See, e.g., *National Boatland, Inc* v *Farmington Hills Zoning Bd of Appeals,* 146 Mich App 380; 380 NW2d 472 (1985).

Defendants also argue that plaintiffs should not be allowed to maintain a federal claim under 42 USC 1983 when they have an available remedy in a state court. However, a § 1983 claim may be brought in a state court. See *Maine* v *Thiboutot,* 448 US 10-11; 100 S Ct 2502; 65 L Ed 2d 555, 563 (1980). In addition, in *McNeese* v *Bd of Education for School District 187, Cahokia, Illinois,* 373 US 668; 83 S Ct 1433; 10 L Ed 2d 622 (1963), the United States Supreme Court found that a person need not first seek a remedy under state law before bringing a claim under § 1983. The Court, quoting *Monroe* v *Pape,* 365 US 167, 183; 81 S Ct 473; 5 L Ed 2d 492, 503, stated:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

In this case, plaintiffs brought a claim for inverse condemnation under both the US Const, Am V and XIV and Const 1963, art 1, sec 17 and art 10, sec 2, as a basis of their § 1983 claim. They were not precluded from bringing a claim under 42 USC 1983 though they did not first exhaust all possible state remedies.

Defendants next contend that plaintiffs' property was not "taken" by the regulation because they were not deprived of all reasonable use of the property considered as a whole. Defendant's contend that plaintiffs can still build one residence on their property. We note that resolution of this issue requires a more indepth analysis than the previous issues.

US Const, Am V, provides that private property shall not be taken for public use without just compensation. Const 1963, art 10, sec 2, provides:

> "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."

It is an established doctrine that, while property can be regulated to some extent, if a regulation goes too far it will be recognized as a taking. *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California,* 482 US ; 107 S Ct 2378, 96 L Ed 2d 250, 264-265 (1987). Moreover, where the government elects to discontinue regulations, compensation for the "temporary" taking is payable. *Id,* 96 L Ed 2d 266, 268. Michigan also recognizes that the application of zoning law to a particular property can constitute a taking. *Poirier* v *Grand Blanc Twp,* 167 Mich App 770, 773; 423 NW2d 351 (1988). In addition, our Supreme Court in *Smith* v *Village of Wood Creek*

Farms, 371 Mich 127, 136; 123 NW2d 210 (1963), reiterated the proposition that a zoning ordinance that renders property almost worthless is unreasonable and confiscatory, and therefore illegal.

The United States Supreme Court has stated that the application of a zoning ordinance to a particular property is a taking if it does not substantially advance a legitimate state interest and if it denies the owner economically viable use of his land. *Nollan* v *California Coastal Comm*, 483 US ___; 107 S Ct 3141; 97 L Ed 2d 677, 687 (1987); *Agins* v *City of Tiburon*, 447 US 250, 260; 100 S Ct 2138; 65 L Ed 2d 106, 112 (1980).

This Court in *Bierman* v *Twp of Taymouth*, 147 Mich App 449, 504; 383 NW2d 235 (1985), lv den 425 Mich 869 (1986), in citing to the leading case authority in Michigan relative to constitutional challenges of a zoning ordinance stated the following:

> "Our review of zoning cases, although de novo, is conducted with the following guidelines in mind:
>
> "This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases. This is primarily because the trial judge is in a better position to test the credibility of the witnesses by observing them in court and hearing them testify than is an appellate court which has no such opportunity. We do not ordinarily disturb the findings of the trial judge in an equity case, unless, after examination of the entire record, we reach the conclusion we would have arrived at a different result had we been in the position of the trial judge.' *Kropf* v *City of Sterling Heights*, 391 Mich 139, 163; 215 NW2d 179 (1974), quoting *Christine Building Co* v *City of Troy*, 367 Mich 508, 518; 116 NW2d 816 (1962).
>
> "The appropriate standard for determining the constitutional validity of a zoning ordinance set forth in *Kropf*,

supra, was outlined concisely in *Kirk* v *Tyrone Twp*, 398 Mich 429, 439-440; 247 NW2d 848 (1976), as follows:

" 'The principles and tests to use to determine whether the present zoning of plaintiffs' property is valid was detailed in *Kropf*.

" 'The important principles require that for an ordinance to be successfully challenged plaintiffs prove:

" ' "[F]irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself * * * or

" ' "[S]econdly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." 391 Mich 139, 158.

" *'The four rules for applying these principles were also outlined in Kropf. They are:*

" '1. " '[T]he ordinance comes to us clothed with every presumption of validity.' " 391 Mich 139, 162, quoting from *Brae Burn, Inc* v *Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957).

" '2. " '[I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property * * * It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its reasonableness.' " 391 Mich 139, 162, quoting *Brae Burn, Inc.*

" '3. " '*Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for*

any purposes to which it is reasonably adapted.' " 391 Mich 139, 162-163.

" '4. " 'This Court, however, is inclined to give considerable weight to findings of the trial judge in equity cases.' " 391 Mich 139, 163, quoting *Christine Building Co* v *City of Troy*, 367 Mich 508, 518; 116 NW2d 816 (1962).' " (Emphasis Added.)

For the purposes of analyzing this inverse condemnation or confiscation case, we note that *Kropf* rules one, three and four above are of particular importance.[1] Recently, another panel of this Court in *Hecht* v *Niles Township*, 173 Mich App 453; 434 NW2d 156 (1988), interpreted the landmark *Kropf* case and clarified that a substantive due process challenge to a zoning ordinance requires a separate and distinct analysis from a confiscation challenge to a zoning ordinance. *Id.*, p 458. This Court in *Hecht* explained that:

"Many trial courts and, indeed we believe, some panels of this Court, have unfortunately misinterpreted these rules and thus have mistakenly intertwined the standards applicable to the different theories of relief, with the result that they have held that a property owner must prove confiscation to succeed in any challenge to a zoning ordinance. We believe that a careful reading of *Kropf*, in particular the context from which these rules were extrapolated, reveals what we perceive as the proper application of the four rules:

"(1) That 'Rule No. 1' applies to all ordinances, regardless of the theory under which a property owner makes a challenge as to its consititutionality;

"(2) That 'Rule No. 2' applies to a challenge to a zoning ordinance which has as its basis the reasonable relationship of land use regulation under the police power of a government unit to public health, safety, morals, or general welfare;

"(3) That 'Rule No. 3' applies to a challenge to a zoning ordinance which has as its basis a claim of confiscation or wrongful taking under the Fifth or Fourteenth Amendments;

"(4) That 'Rule No. 4' applies to an appellate court's review of a trial court's findings regardless of the theory or theories advanced.

* * *

"*Kropf* continues to make apparent the fact that a distinct analysis must be used where a claim is made that the zoning ordinance results in confiscation of the plaintiff's land without just compensation. After analyzing the plaintiffs' substantive due process claim, the Court then *separately* addressed the confiscation argument advanced by the plaintiffs:

" 'Turning now to the issue upon which plaintiffs presented almost the totality of their proofs, we consider whether, in this situation, plaintiffs' property has been so restricted as to amount to a confiscation of their property. Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.' *Kropf*, at 162-163 (citing *Brae Burn, Inc.*, at 434-435).

"It is from this statement that 'Rule No. 3' has been taken.

"The view expressed in 'Rule No. 3' is originally found in the landmark New York case of *Arverne Bay Construction Co* v *Thatcher*, 278 NY 222; 15 NE2d 587 (1938), and was discussed in the context of the plaintiff's assertion that a New York City zoning ordinance constituted a confiscatory taking of his property without just compensation. Further-

more, *Brae Burn, Inc, supra*, references the *Arverne Bay* case in the context of its discussion of the confiscation argument advanced by its plaintiff. See also 1 Anderson, American Law of Zoning (3d ed), 3.27, p 169-170.

"We believe that the Kirk Court clearly understood and properly applied this rule to situations where a plaintiff was challenging the confiscatory nature of a zoning ordinance. Kirk returned to the root of the rule as found in Kropf and stated:

" 'In Kropf we required the property owner claiming confiscation to prove that application of the existing ordinance to his property would "preclude its use for any purpose to which it is reasonable adapted." 391 Mich 139, 163.' Kirk, supra, p 444." *Id.*, pp 459-460, 462-463.

Based on the foregoing, we are required to apply *Kropf* rules one, three and four to the facts of the case at bar.

Turning to rule one, that the ordinance is clothed with every presumption of validity, the township attorney argued the following:

"Your Honor, the Township in this kind of situation is between a rock and a hard place.

"We're charged with the maintenance and the welfare of our citizens. We've decided based on our experience with private roads that we have to be sure the people have passable access to the property where fire equipment can get in, emergency equipment can get in.

"This is a lake front parcel. The first time that a piece of emergency equipment can't get in there when there's a child drowning or there's a fire, the township will not only be criticized, they'll probably be sued.

* * *

"But when there's more than one dwelling involved, public interest becomes involved. And there's more than one dwelling involved in this situation and that's why the township adopted this private road ordinance."

We have no doubt that the challenged ordinance is clothed with a presumption of validity. It attempts to deal with the health, safety and welfare of the public. We do note, however, that plaintiffs' easement is twenty feet wide and this private drive would only service two homes. Plaintiffs' argued that there would be limited use of this drive by the general public and that the twenty-foot easement would be wide enough to accommodate emergency equipment for the two single family dwellings.

As for rule three, plaintiffs must show that if the ordinance is enforced the consequent restrictions on their property preclude its use for any purposes to which it is reasonably adapted.

The stipulated facts reveal that enforcement of the ordinance precludes plaintiffs from using one of their two parcels as it is zoned, that is, for a single-family dwelling. Moreover, plaintiffs' attempts to sell the property have been unsuccessful. Plaintiffs' property is unquestionably two separate parcels which are taxes separately and which are considered separate parcels by the township The lower court noted that before enactment of the 1977 private road ordinance, plaintiffs could have lawfully built two single-family dwellings on the parcels and that enforcement of the ordinance constitutes a regulatory taking and is confiscatory. We agree. Our review of the record leads us to conclude that plaintiffs have shown that the township's private road ordinance as applied to their property precludes it use for any purpose to which it is reasonably adapted. *Kropf, supra.*

Finally, rule four requires that we give considerable weight to the findings of the trial judge. We have done so in this case and agree that the ordinance constitutes a regulatory taking of one of plaintiffs' two parcels. Therefore, the lower court's permanently enjoining defendant from enforcing its private road ordinance to

plaintiffs' two parcels and the court's award of attorney fees is affirmed.

Affirmed. Plaintiffs may tax costs.

/s/ William B. Murphy
/s/ John H. Shepherd
/s/ Tyrone Gillespie

(1) In light of recent U.S. Supreme Court pronouncements in taking law, particularly *Nollan, supra,* and *First English Evangelical, supra,* we question the continuing viability of the *Kropf* rules in analyzing cases involving taking issues. It appears that these recent Supreme Court decisions might necessitate a reexamination of the *Kropf* rules to reflect this development in the law in placing a greater burden on the governmental entity in regulating private property. However, since we will conclude that the municipality cannot even satisfy the applicable *Kropf* rules, this does not present the appropriate case to consider the impact of these recent Supreme Court decisions on the *Kropf* rules.

Opinion of Trial Court

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

WILLIAM BEVAN and
WAVA BEVAN, his wife,
Plaintiffs,

-vs-

TOWNSHIP OF BRANDON, a
constitutional corporation,
and TOWNSHIP OF BRANDON
BOARD OF APPEALS,
Defendants.
_____/

No. 86-323355 AA

OPINION

This matter is before the Court for entry of a judgment upon stipulated facts. MCR 2.116(A). All parties have waived a trial and evidentiary hearing.

Plaintiffs own adjacent lakefront parcels of land in Brandon Township. The parcels were acquired separately in 1954 and 1964. The parcels are taxed separately by the defendant. Ingress and egress is provided by a twenty foot easement.

On February 13, 1977, defendant enacted a Private Road Ordinance the terms of which preclude construction of a residence on each parcel unless a sixty-six foot right-of-way or private road provides access. Existence of the private road is a condition precedent to defendant issuing a building permit.

Prior to enactment of the Private Road Ordinance, plaintiffs' lots satisfied all lawful requirements of the defendant. Plaintiffs could have sold the lots separately or built and sold two single family dwellings. Enactment and enforcement of the ordinance effectively prevents these two separate uses. This constitutes a temporary, regulatory taking of property without compensation.

Opinion of Trial Court

The applicable rule of law was announced by the United States Supreme Court in the case of *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 55 USLW 4781, 4784-85.

> We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of " 'the self-executing character of the constitutional provision with respect to compensation. . . .' " *United States* v *Clarke*, 445 U.S. 253, 257 (1980), quoting 6 P. Nichols, Eminent Domain §25.41 (3d rev. ed. 1972).
>
> * * * *
>
> "[T]emporary" takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation, Cf. *San Diego Gas & Electric Co.*, 450 U.S., at 657 (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable"). It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (Citations omitted).

Plaintiffs seek no compensation for the temporary taking, but do seek reasonable attorney fees. Plaintiffs and defendant stipulated that a reasonable attorney's fee, if awarded, would be in the amount of $5,300. The attorney's fee being reasonable and necessary is proper in this case. 42 USC 1988, *see also* MCL 213.66(2).

Accordingly, a judgment may enter finding that enforcement of the Private Road Ordinance constitutes a regulatory taking and is confiscatory. Defendant is permanently enjoined from applying the Private Road Ordinance to the plaintiffs' parcels. Plaintiffs are awarded a reasonable attorney's fee in the amount of $5,300.

Judgment of Trial Court

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

WILLIAM BEVAN and WAVA BEVAN, his wife,
Plaintiffs,

Vs.

No. 86-323355-AA

TOWNSHIP OF BRANDON, a constitutional corporation, and TOWNSHIP OF BRANDON BOARD OF APPEALS,
Defendants.
_____/

THOMAS J. RYAN, P.C. (P19808)
Attorney for Plaintiffs
2055 Orchard Lake Road
Pontiac, Michigan 48053
334-9938

RICHARD A. CAMPBELL (P11561)
Attorney for Defendants
20 W. Washington St., Ste. 1
Clarkston, Michigan 48016
625-0600

DAVID J. NAVARRE (P25080)
Attorney for Defendants (Of Counsel)
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, Michigan 48333-0040
851-9500

HONORABLE JAMES S. THORBURN,
Circuit Judge (P21427)
_____/

Judgment of Trial Court

JUDGMENT

At a session of said Court, held in the Court House in the City of Pontiac, Oakland County, Michigan, on this day of , 1987.

PRESENT: HONORABLE JAMES S. THORBURN,
Circuit Judge

This matter having come on for hearing, all parties being represented by counsel, and the Court being fully advised in the premises and having issued its written Opinion,

IT IS HEREBY ORDERED that the enforcement of the Brandon Township Private Road Ordinance is a regulatory taking regarding the subject property and is confiscatory.

Upon presentation, the Court will sign an order to this effect.

DATED: August 31, 1987.

JAMES S. THORBURN,
Circuit Judge

IT IS FURTHER ORDERED that Defendant, Township of Brandon, is permanently enjoined from applying the Private Road Ordinance to Plaintiffs' parcels described as follows:

Land in the Township of Brandon, County of Oakland, and State of Michigan, to-wit: Part of the SE ¼ of Sec. 10, T.5N., R.9E., described as beginning at a point distant N. 0°58'E. 1329.35 feet and S. 89°48'E. 1529.75 feet from the S. ¼ corner, thence S. 0°58'W. 150 feet, thence S.89°48'E. 1117.50 feet, thence N.0°24'E. along the Section line 150 feet, thence N. 89°48'W. 1116.10 feet to the point of beginning,

Also an easement over and across a 20 foot strip of land the center line of which is described as follows: Beginning at a point on the north and south quarter section line distant North 0°58′East 1256.62 feet from the south quarter section corner; thence North 63°31′ East 139.68 feet to a Point; thence South 89°48′East 1395.79 feet to a point 10 feet west of the west line of the above described parcel of land; thence South 0°58′West 290.0 feet to the end of said easement.

(Parcel 1 — Sidewell No. 03-10-476-001)

Land in the Township of Brandon, County of Oakland, and State of Michigan, to-wit: Beginning at a point distant north 0 degrees 58 minutes east along the north and south quarter Section line 1329.35 feet and south 89 degrees 48 minutes east, 1529.75 feet and south 0 degrees 58 minutes west 150.0 feet from the south quarter section corner of said Section 10, thence south 0 degrees 58 minutes west 150.0 feet; thence south 89 degrees 48 minutes east, 1119.03 feet to a point on the east line of Section 10, thence north 0 degrees 24 minutes east along the east section line 150.0 feet; thence north 89 degrees 48 minutes west 1117.58 feet to the place of beginning. Subject to the rights of the public and of any governmental unit in any part thereof taken, used or deeded for street, road, or highway purposes.

Also an easement over and across a 20 foot strip of land the center line of which is described as follows: Beginning at a point on the north and south quarter section line distant North 0°58′ East 1256.62 feet from the south quarter section corner; thence North 63°31′ East 139.68 feet to a Point; thence South 89°48′East 1395.79 feet to a point 10 feet west of the west line of the above described parcel of land; thence South 0°58′West 290.0 feet to the end of said easement.

(Parcel 2 — Sidwell No. 03-10-476-002)

Judgment of Trial Court

IT IS FURTHER ORDERED that Plaintiffs are awarded an attorney fee in the amount of Five Thousand Three Hundred Dollars ($5,300.00).

_____
CIRCUIT JUDGE

APPROVED AS TO FORM:

_____
RICHARD A. CAMPBELL
(P11561)
Attorney for Defendants

_____
DAVID J. NAVARRE
(P25080)
Attorney for Defendants
(Of Counsel)

Statement of Stipulated Facts

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

WILLIAM BEVAN and
WAVA BEVAN, his wife,
Plaintiffs,

vs

TOWNSHIP OF BRANDON, a
constitutional corporation,
and TOWNSHIP OF BRANDON
BOARD OF APPEALS,
Defendants.

Oakland County Circuit
No. 86-323355-AA

THOMAS J. RYAN (P19808)
Attorney for Plaintiffs
2055 Orchard Lake Road
Pontiac, MI 48053
334-9938

STUART B. COONEY (P25900)
RICHARD A. CAMPBELL (P11561)
Attorney for Defendants
20 W. Washington St., Ste. 1
Clarkston, MI 48016
625-0600

HONORABLE JAMES S. THORBURN,
CIRCUIT JUDGE (P21427)

STIPULATION AND ORDER AS TO MATERIAL FACTS

IT IS HEREBY STIPULATED AND AGREED to by the parties herein, that the following facts shall be taken as stipulated and agreed to in the above-entitled cause.

Statement of Stipulated Facts

STIPULATED FACTS

Plaintiffs purchased this lakefront property in two parcels by separate land contracts on September 20, 1954, and June 11, 1964 and took title in 1964 and 1970. Thereafter, Wava Bevan, formerly Wava Warner, transferred title to herself and William Bevan, her husband.

Deeds creating the above transfers reserve an easement 20 feet wide from the nearest public highway to the parcel, and such deeds predate the Zoning Ordinance and Private Road Ordinance, hereafter discussed.

The property does *not* have frontage on any public roadway. The only access is the easement.

In 1974, Brandon Township adopted its Zoning Ordinance. A copy of the relevant section of that ordinance (Section 5.07 *Required Street Frontage*) is attached hereto and incorporated herein. *Other than those street frontage requirements, the parcel, as divided, meets the Zoning Ordinance requirements for two (2) buildable sites.*

In 1977, Brandon Township adopted a Private Road Ordinance. That ordinance is Brandon Township Ordinance No. 42, and a copy of that ordinance is attached hereto and incorporated herein.

At the time that Wava Bevan purchased the parcel, her predecessor in interest had already divided the parcel, which parcel is approximately six (6) acres, into two (2) tax descriptions.

The easement that exists for the purpose of serving the parcel does not meet the minimum private road requirement as set forth in Article VII, Section 7.1 of the Brandon Township Private Road Ordinance. (See attached) The Bevans, seeking to obtain two (2) building permits on their parcel, one (1) for each of the tax descriptions, applied to the Township Board of Zoning Appeals

for a variance with regard to the road width (from the required 66′ to 20′, the amount they owned) so as to permit them to build a private road on the parcel, which private road would then entitle them to two (2) building permits. Section 2.5 of the Brandon Township Private Road Ordinance requires a private road when the roadway is going to service more than one (1) residence. The variance would not be necessary if the Bevan's sought to build only one house because the Bevans would be entitled to one permit, and could obtain that at any time.

The Brandon Township Zoning Board of Appeals denied the request for a variance with regard to the width requirement. As a result of that denial this Complaint was filed. The first two (2) Counts of the Complaint deal with the appeal, and a request for delayed appeal from the action of the Zoning Board of Appeals. The next three Counts of the Complaint deal with, "Violation of Constitutional Rights", "Civil Rights Act" and "Declaratory Judgment: Township of Brandon's Private Road Ordinance as Unconstitutional".

Since the Board of Appeals action, the Bevans have tried unsuccessfully to sell the property to the Department of Natural Resources.

The access easement is unimproved and there has been no construction on the building sites. (See Minutes of Board of Appeals, attached to Plaintiff's Complaint and accepted by Defendant.)

Statement of Stipulated Facts

Bevans out of pocket damages to date are Five Thousand One Hundred Twenty Five ($5,125.00) Dollars attorney fees, costs of One Hundred Seventy ($170.00) Dollars for expert witness fees, Fifty ($50.00) Dollars court costs, and Sixteen ($16.00) Dollars subpoena fees for a total of Five Thousand Three Hundred Sixty One ($5,361.00) Dollars.

THOMAS J. RYAN, P.C.
(P19808)
Attorney for Plaintiffs
2055 Orchard Lake Road
Pontiac, MI 48053
334-9938

RICHARD A. CAMPBELL
(P11561)
Attorney for Defendants
20 W. Washington St., Ste. 1
Clarkston, MI 48016
625-0600

DATED: AUGUST , 1987

IT IS SO ORDERED.

JAMES S. THORBURN,
CIRCUIT JUDGE

15.055 interrupted at not more than fifteen (15) percent of its required length if necessary to provide for vehicular access, except that the wall may be interrupted at more than fifteen (15) percent of its required length if necessary to provide for one (1) vehicular access and egress lane. THE WALL MAY BE OMITTED along the portion of parking and vehicular-use area periphery which lies adjacent to a protective screen wall or landscape buffer strip of the type required in A and B above, and along the portion of the parking and vehicular use area periphery which lies adjacent to a building on the same lot as the parking area. A thirty-six (36) inch high berm completely covered with live landscape material may be substituted for the wall with Planning Commission approval.

(2) Off-street parking areas shall have a minimum of one (1) deciduous tree for every ten (10) parking spaces. (ord. eff. May 6, 1974; amend. eff. Apr. 7, 1986)

15.056 Sec. 5.06. **ONE LOT, ONE BUILDING.**

In Single-Family Residential Districts, only one (1) principal building shall be placed on a lot of record with the exception of parcels of record which may be so arranged or subdivided as to provide for one (1) or more principal buildings when the land area allocated to each building is equal to or greater than the lot area required for the district and the building.

(ord. eff. May 6, 1974)

Brandon Township Zoning Ordinance Section 5.07

15.057 Sec. 5.07. **REQUIRED STREET FRONTAGE.**

Any parcel of land which is to be occupied by a use or building, other than an accessory use or building, shall have frontage on and direct access to a public street or private easement which meets one of the following conditions:

1. A public street which has been accepted for maintenance by the County Road Commission, or
2. A permanent and unobstructed private easement of record at the County Register of Deeds where said easement is constructed in accordance with the Brandon Township Ordinance regulating the construction of private roads, or
3. An access easement of record where said easement had in fact been constructed and in use as a private road prior to May 6, 1974; or
4. Frontage on a cul-de-sac in which case said road frontage may be less than the minimum required by Article XVIII, Schedule of Regulations, so long as the cul-de-sac is constructed in accordance with County or Township standards, and so long as the lot width on said lots front building setback line is at least the minimum as set forth in Article XVIII, or

Brandon Township Zoning Ordinance Section 5.07

5. Frontage on a private drive, which drive may serve no more than one single use, where said frontage is at least equal to the minimum as set forth in Article XVIII, Schedule of Regulations, and where said drive has direct access to either a dedicated and accepted County road or a road built in accordance with the Brandon Township Ordinance regulating the construction of private roads. In all of the cases to which the subsection applies, the driveway shall be at least sixty-six (66) feet wide to permit its upgrading to a private road and it shall be owned in fee simple by the same owner as the parcel which it serves or it shall be an easement dedicated to use by the public and recorded as such. Such driveway shall also contain a restrictive covenant running to the benefit of Brandon Township providing that such driveway cannot be split off or sold separately from a parcel which it serves, either as a fee parcel, or as an easement dedicated to the use of the public. Further, in no event shall driveway cross more than one attendant parcel before it reaches either a dedicated and accepted County road or a road built in accordance with the Brandon Township Ordinance regulating the construction of private roads. The area of such driveway may be counted in computing the lot size of the parcel which holds the fee, including width and depth and other dimensions of such parcel, except that all setbacks and building lot lines concerning such parcel shall be measured from the easement frontage line, further, should such driveway at anytime serve more than one single use, then and in that event such driveway must, before it can be used for more than a single use, be constructed in accordance with the Brandon Township Ordinance regulating the construction of private roads.

Nothing in this Section or any subsection hereof shall be deemed to waive any requirement regarding lot size, depth, width or any other dimension or other requirement whatsoever other than those requirements specifically set forth herein.

15.058 Sec. 5.08. **PROHIBITED PARKING IN ALL RESIDENTIAL DISTRICTS.**

1. Automotive vehicles or trailers of any kind without current license plates shall not be parked or stored on any residentially zoned property other than in completely enclosed buildings.
2. Commercial highway trailers and trucks with a rated capacity exceeding one (1) ton shall not be parked or stored on any residentially zoned property other than in completely enclosed buildings.
(ord. eff. May 6, 1974)

15.059 Sec. 5.09. **AUTOMOBILE SERVICE STATIONS.**

In order to regulate and control the problems of noise, odor, light, fumes, vibration, dust, danger of fire and explosion, and traffic congestion, which results from the unrestricted and unregulated construction and operation of automobile service stations, and to regulate and control the adverse effects which these and other problems incidental to the automobile service may exercise upon adjacent and surrounding areas, the following additional regulations and requirements of this Section. No station existing on the effective date of this Ordinance shall be structurally altered so as to provide a lesser degree of conformity with the provisions of this Section than existed on the effective date of this Ordinance.

Brandon Township Zoning Ordinance Section 5.07

1. An automobile service station shall be located on a lot having a frontage along the principal street of not less than one hundred and forty (140) feet, and having a minimum area of not less than fourteen thousand (14,000) square feet.
2. An automobile service station building housing an office and/or facilities for servicing, greasing and/or washing motor vehicles shall be located not less than forty (40) feet from any street lot line, and not less than twenty-five (25) feet from any side or rear lot lines adjoining a residentially zoned district.

Brandon Township Private Road Ordinance

30.000

PRIVATE ROADS
BRANDON TOWNSHIP, MICHIGAN
ord. no. 42 eff. Feb. 13, 1977

Ordinance to control the construction of and set standards and specifications for private roads.

PREAMBLE

This Ordinance is intended to provide minimum standards and specifications for private roads constructed in the Township of Brandon, Oakland County, Michigan. It is recognized that such standards are necessary because of the need for road services adequate to provide year around access by fire, police, and like emergency vehicles. It is further recognized that if roads are not constructed in accordance with certain minimum standards, such roads frequently become impassable, and vehicles which do try to use them during such periods of impassability are likely to become stuck, find it impossible to gain access to the persons or structures located on the roadway, block the roadway and otherwise pose a threat to the health, safety and welfare of the residents located along the roadway, as well as those other residents who would find use of the roadway essential.

30.010

ARTICLE 1
SHORT TITLE

Sec. 1.1. **TITLE.** This Ordinance may be referred to as the Brandon Township "Private Roads" Ordinance and shall hereinafter be referred to as "this Ordinance".
(ord. no. 42 eff. Feb. 13, 1977)

30.020

ARTICLE II
DEFINITIONS

30.021 Sec. 2.1. **BOARD.**

Board shall refer to the Brandon Township Board of Trustees.
(ord. no. 42 eff. Feb. 13, 1977)

30.022 Sec. 2.2. **OAKLAND COUNTY ROAD COMMISSION.**

Oakland County Road Commission shall refer to the Board of County Road Commissioners, County of Oakland, State of Michigan.
(ord. no. 42 eff. Feb. 13, 1977)

30.023 Sec. 2.3. **PERSON.**

Person shall mean any individual, firm, association, partnership, corporation, or any combination of any of them.
(ord. no. 42 eff. Feb. 13, 1977)

30.024 Sec. 2.4. **PRIVATE DRIVEWAY.**

Private Driveway shall mean any piece of privately owned and maintained property which is used for vehicular traffic, but is not open or normally used by the public.
(ord. no. 42 eff. Feb. 13, 1977)

30.025 Sec. 2.5. **PRIVATE ROAD.**

Private Road shall mean a privately owned and maintained road, allowing access to more than one residence or place of business, which is normally open to the public and upon which persons other than the owners located thereon may also travel. The erection of such signs as, "Residents Only", or the like shall not be deemed to remove any roadway from the requirements of this Ordinance where said roadway is deemed to come within this Ordinance by the Supervisor of the Brandon Township Building Department or his designee.
(ord. no. 42 eff. Feb. 13, 1977)

30.026 Sec. 2.6. **ROAD.**

Road shall mean a thoroughfare which affords vehicular traffic circulation and principal means of access to abutting property, including avenue, place, way, drive, lane, boulevard, highway, street and other thoroughfare, except an alley or private driveway.
(ord. no. 42 eff. Feb. 13, 1977)

30.027 Sec. 2.7. **STRUCTURE.**

Structure shall mean any assembly of materials constructed or erected for occupancy or use which requires permanent location on the ground or attachment to something having such a permanent location.
(ord. no. 42 eff. Feb. 13, 1977)

30.050

ARTICLE III
PROHIBITIONS

30.051 Sec. 3.1. **CONSTRUCTION OF PRIVATE ROADS.**

No persons shall construct a private road within the Township of Brandon except in accordance with the standards as herein set forth.
(ord. no. 42 eff. Feb. 13, 1977)

30.052 Sec. 3.2. **SALE OF PARCELS OF LAND.**

No person shall sell any parcel of land within the Township of Brandon unless said parcel of land fronts on a public street which is dedicated to the public or unless said parcel of land fronts on a private road which road meets the standards as herein set forth, or unless said contract, deed or other conveyance of sale contains the following language:

> "This parcel is not a buildable site for the reason that said parcel does not front on an acceptable ingress and egress in accordance with standards as set forth by the Ordinance of the Township of Brandon."
> (ord. no. 42 eff. Feb. 13, 1977)

30.053 Sec. 3.3. **BUILDING PERMITS.**

No building permit shall be issued by the Brandon Township Building Department or any official therein, or any other official of the Township of Brandon for any structure unless said structure fronts on a public street or highway which is dedicated to the public, or unless said structure fronts on a private road which road meets the standards as herein set forth. Nothing in this section shall be deemed to waive any of the frontage, depth, or like requirements as set forth in the Township of Brandon Zoning Ordinance.
(ord. no. 42 eff. Feb. 13, 1977)

30.080 **ARTICLE IV**
NOTICE

30.081 Sec. 4.1. **CONVEYANCE OF INTEREST IN LAND ABUTTING PRIVATE ROAD.**

At the time of the conveyance of any interest in any parcel, and which parcel abuts a private road as herein set forth, which conveyance shall be deemed to include the acceptance of an offer to purchase, the grantor of such interest shall advise the grantee that said parcel abuts a private roadway, and that the maintenance, care, and other responsibilities concerning said roadway rest with the abutting land owners and are not the responsibility of the Township of Brandon, the County of Oakland, or the State of Michigan.
(ord. no. 42 eff. Feb. 13, 1977)

30.100 **ARTICLE V**
PERMITS.

30.101 Sec. 5.1. **PERMIT REQUIRED.**

No construction shall begin on any private road until a permit has been issued on forms provided for that purpose by the Brandon Township Building Department on proper application therefor and following compliance with such requirements as are set forth in the application.
(ord. no. 42 eff. Feb. 13, 1977)

30.102 Sec. 5.2. **APPLICATION; FEE.**

The Brandon Township Building Department may establish such requirements as it deems necessary in the application for permits, but such requirements shall contain at least the following:

A. A drawing to a scale of no less than one (1) inch equals one hundred (100) feet which drawing has been prepared by a registered civil engineer or a registered land surveyor, as registered by the State of Michigan, and which drawing shall show the exact location of the roadway as proposed, including a cross section of said roadway to its full width including all ditches.

B. A drawing of all cul-de-sacs to be located along said private roadway, which cul-de-sacs shall not be less than one hundred twenty (120) feet in diameter in residential areas and one hundred sixty (160) feet in commercial or industrial areas.

C. An overall development plan for all contiguous land in which the person has an interest of any nature.

D. The payment of a permit fee as established by the Brandon Township Building Department and approved by the Brandon Township Board.
(ord. no. 42 eff. Feb. 13, 1977)

30.120 **ARTICLE VI**
STANDARDS

30.121 Sec. 6.1. **MINIMUM DESIGN STANDARDS.**

The minimum design standards for any private roadway constructed within the Township of Brandon shall be in accordance with the Oakland County Road Commission "Type C" roadway standards as of January 3, 1977. (ord. no. 42 eff. Feb. 13, 1977)

30.122 Sec. 6.2. **EXTENDING EXISTING PRIVATE ROADS.**

In those cases where the applicant seeks to extend an existing private road, such extension shall be granted only if the existing private road is brought up to the standards as set forth in this Ordinance for private roads within Brandon Township. All of such standards as set forth herein shall be deemed to apply to both the proposed extension, and the existing roadway. Further, such applicant shall obtain consents from all of those persons who own any interest in the existing right-of-way, or have the right of access to their property therefrom, which consent shall be in writing and shall be filed with the Township contemporaneously with the filing of the application for permit hereunder. Such consent shall provide, (1) that consenting party consents to the extension of the roadway pursuant to the application, and (2) that the consenting party consents to the upgrading of their existing roadway to the standards as set forth herein, and, where applicable, will agree to deed such easements or rights-of-way as are necessary to create the width and like requirements as set forth herein. The Township Zoning Board of Appeals shall not vary this requirement as it concerns consents.

(ord. no. 42 eff. Feb. 13, 1977; amend. by ord. no. 60 eff. Nov. 14, 1981)

30.123 Sec. 6.3. **EASEMENTS.**

The proposed private roadway shall contain easements for all utilities, both present and proposed future, as may be necessary for providing public services to the property. Such provision may be general in nature, that is providing that utilities may be placed under the roadway in any and each and every location, or such provision may be specific in nature, so long as the specific provision meets the requirements as set forth by Brandon Township Building Department.
(ord. no. 42 eff. Feb. 13, 1977; amend. by ord. no. 60 eff. Nov. 14, 1981)

30.140 **ARTICLE VII**
RIGHT-OF-WAY

30.141 Sec. 7.1. **MINIMUM WIDTH.**

All rights-of-way shall be a minimum of sixty-six (66) feet in width.
(ord. no. 42 eff. Feb. 13, 1977)

30.142 Sec. 7.2. **DEDICATION.**

All rights-of-way shall be dedicated to the adjoining property owner who gains access of said right-of-way. If a parcel adjoining said right-of-way is not to be served by said right-of-way, then the land dedicating such right-of-way shall specifically provide for that exclusion, and said adjoining property owner shall not share in the ownership of the right-of-way.
(ord. no. 42 eff. Feb. 13, 1977)

30.143 Sec. 7.3. **RECORDATION.**

All rights-of-way created hereunder shall be recorded as such with the Oakland County Register of Deeds.
(ord. no. 42 eff. Feb. 13, 1977)

30.160 **ARTICLE VIII**
NAMING

Sec. 8.1. **APPROVAL OF NAME; NAME SIGNS AND POSTS.**

All private roads created hereunder shall be named, with said name to be approved by the Brandon Township Board and Oakland County Road Commission. All required name signs and sign posts shall be erected by the Oakland County Road Commission at the expense of the applicant.
(ord. no. 42 eff. Feb. 13, 1977)

30.180 **ARTICLE IX**
APPEALS

30.181 Sec. 9.1. **APPEAL TO BOARD OF ZONING APPEALS.**

Any decision by the Supervisor of the Brandon Township Building Department or his designee may be appealed to the Brandon Township Board of Zoning Appeals which may grant a modification of any requirement of this Ordinance where no good purpose would be served by compliance therewith.
(ord. no. 42 eff. Feb. 13, 1977)

30.182 Sec. 9.2. **CONSIDERING APPEALS.**

In considering appeals hereunder, the Brandon Township Board of Zoning Appeals shall be charged the interpretation of the language of this Ordinance and the implementation of this Ordinance in accordance with the requirements of the other ordinances of Brandon Township which relate to any aspect of the areas governed by this Ordinance.
(ord. no. 42 eff. Feb. 13, 1977)

Brandon Township Private Road Ordinance

30.183 Sec. 9.3. **COUNTY ROAD COMMISSION STANDARDS.**

In no event shall the Brandon Township Board of Zoning Appeals vary the road width requirements or the minimum construction requirements as set forth in the Oakland County Road Commission Standards for Type C roadways.
(ord. no. 42 eff. Feb. 13, 1977)

30.184 Sec. 9.4. **ROADS NOT MEETING STANDARDS OF ORDINANCE.**

In those instances where a permit is being sought for the construction of a structure on an existing private roadway, which private roadway does not meet the standards as herein set forth, the Township Board shall, wherever possible and practical, require that said private roadway be brought up to the standards as herein set forth. However, in those instances where extreme hardship or practical difficulties are such as to render the improvement of the private roadway unfeasible, the Township Board may direct the Township Building Department to issue building permits on said existing private roadways.
(ord. no. 42 eff. Feb. 13, 1977)

30.185 Sec. 9.5. **APPEALS TO COUNTY CIRCUIT COURT.**

Appeals from decisions of the Brandon Township Board of Zoning Appeals shall be made to the Oakland County Circuit Court.
(ord. no. 42 eff. Feb. 13, 1977)

30.210 **ARTICLE X**
VIOLATIONS

30.211 Sec. 10.1. **INJUNCTIVE RELIEF.**

Brandon Township may, by direction of any of its officials, seek to restrain the violation hereof by the issuance of ex parte, temporary and permanent injunctive orders restraining the violation hereof.
(ord. no. 42 eff. Feb. 13, 1977)

30.212 Sec. 10.2. **PENALTY.**

In addition to the injunctive relief as above set forth, the Brandon Township Building Department, or any other agency of the Township of Brandon, may seek prosecution for violations hereof which violations shall be punished by a fine of up to Five Hundred and 00/100 ($500.00) Dollars, and/or imprisonment in the Oakland County Jail for a period of ninety (90) days, or both fine and imprisonment as the Court may direct.
(ord. no. 42 eff. Feb. 13, 1977)

30.230 **ARTICLE XI**
SEVERABILITY

Sec. 11.1. **SEVERABILITY.** Should any clause, phrase, or other portion of this Ordinance be found to be invalid for any reason whatsoever, such invalidity shall not affect the remaining portions of this Ordinance in any respect but this Ordinance shall be otherwise deemed to be enforceable.
(ord. no. 42 eff. Feb. 13, 1977)

30.240

ARTICLE XII
EFFECTIVE DATE

Sec. 12.1. **ADOPTION; EFFECTIVE DATE.** This Ordinance was adopted by the Brandon Township Board on the 3rd day of January, 1977, and shall take effect thirty (30) days after publication thereof in accordance with Michigan Statute.

Adopted: January 3, 1977
Effective: February 13, 1977

Trial Argument Transcript

August 20, 1987
Pontiac, Michigan

* * *

THE CLERK: Calling William Bevan v Township of Brandon, 86-323-355 AA.

THE COURT: Approach the bench, gentlemen.

MR. RYAN: May it please the Court, Tom Ryan, appearing on behalf of Mr. William Bevan, Your Honor.

MR. CAMPBELL: Richard A. Campbell on behalf of Brandon Township.

MR. NAVARRE: Your Honor, I am Dave Navarre, of the firm of Kohn, Secrest, Wardle, Lynch, Clark & Hampton. We are of counsel to the defendant Township.

MR. RYAN: Your Honor, the Court is well aware of the facts. We appreciate the Court taking the time to hear this matter.

There are two separate parcels of property, Your Honor, owned by the Bevans. They purchased those parcels prior to the enactment of the present zoning orders in Brandon Township, for the —

THE COURT: The Court is quite familiar with the facts.

MR. RYAN: Yes, Your Honor.

THE COURT: We've been over those several times.

MR. RYAN: I'll go right into my argument, Your Honor.

We believe, first of all, that as to statutory interpretation question, that this driveway that the township insists is a private road does not meet their definition of a private road.

A private road, which is taken from Michigan Statutes MCL 257.44 provides, Your Honor, that a private road is a privately

owned and operated and maintained road, allowing access to more than one residence or place of business.

If the Statute stopped there, Your Honor, the township would have a valid point.

However, the Statute and ordinance continues, "which is normally open to the public and upon which persons other than the owners located may travel.

Your Honor, this road dead ends into a lake. It is a twenty foot easement, it is a private driveway serving only two parcels of property upon which the easement runs to.

Private driveway is also in the Statute, Your Honor, I won't belabor that point.

If the Court feels further that there's a statutory question, that we believe the private road ordinance, Your Honor, as mentioned by the Zoning Ordinance, is a non-conforming use. We only have twenty feet of easement, Your Honor. The private road ordinance is mentioned in the zoning ordinance; it's a hybrid ordinance if you will. The township indicates that it's only a public — or a police power ordinance.

We contend that because it's mentioned in the zoning ordinance and later enacted, Your Honor, that it is, in fact, a zoning ordinance and the court could simply find it's a nonconforming use, a prior nonconforming use of record; therefore the private road ordinance does not apply.

If the Court feels the private road ordinance does apply to this piece of property, we contend that it is unconstitutional for the following reasons, Your Honor. It takes property for public purpose without just compensation being paid. That is the Fifth Amendment of the United States Constitution, Your Honor.

Now the courts have stated, and there's three new cases which the Court has read, the Nolan case, the First Lutheran case and the Keystone case.

And the Nolan case, Your Honor, that was a ten foot easement the State of California wanted along the beach. The Court said that there must be a substantial interest, legitimate state interest between the purpose served and the ordinance.

Now in this case, Your Honor, the purpose of the road ordinance is to provide for passable roads in Brandon Township. If it's a public road, that is certainly a laudable and proper goal.

However, Your Honor, the reason why we cannot provide a private road under their ordinance is we only have twenty feet of property, not the sixty-six feet of right-of-way that they require.

Now we believe, and this is the worse case scenario for the Township, Your Honor, because we don't have just one parcel, we have only two. We don't have fifteen being served by private road or three or four, we have only two parcels, Your Honor, which are residential parcels.

Now a sixty-six foot right-of-way, a right-of-way can do a lot of things, Your Honor, but a right-of-way doesn't necessarily mean that it will be a passable road, right-of-ways contain all kinds of things: They contain easement for drainage, for utilities, for telephone, for whatever. This is only a twenty-foot driveway we have, Your Honor.

Therefore, we contend that the twenty foot should be sufficient, since was of record and the right-of-way ordinance, the sixty-six feet required, does not substantially advance the state interest; that is having passable roads.

Your Honor, we next come to the fact was it a taking. We contend there was a taking of property. There's the Keystone case, which says that the Court must look to the particular facts of these cases and decide them necessarily on an ad hoc basis, looking at the impact of the regulations on the property.

In the Keystone case, Your Honor, the State of Pennsylvania provided that fifty percent of all the substrata under public

buildings, schools, lakes and private residences couldn't be used for coal mining. The coal company said you're taking fifty percent of our property without compensation.

The Court looked at the property interest and found in that case that in fact only two percent of the coal of this coal company was being taken.

Therefore, you have to look at the particular property interest being taken, Your Honor.

And in this case the township has said you can have only one buildable site on two proper building locations. We're not seeking to change the zoning, we're not seeking to overburden the zoning; we're seeking to use the zoning as properly found. The only reason we can't do it is because we cannot provide the proper right-of-way for those two parcels.

Now, Your Honor, any way you want to look at it, under the Keystone case, either you say well, Mr. Ryan, the Bevans own two parcels, if they can't use one, that's a fifty percent diminution of taking, or fifty percent of their property they can't use as a building site.

Or you could say, Your Honor, that they bought these parcels as separate parcels. One they bought in '53, and one they bought in '63; paid taxes on two separate parcels for all those years.

If they wanted to consolidate those parcels, Your Honor, they could have done so. That's a private concern. But the township is saying no and you must consolidate these parcels, you must give up these building sites and put only one building site there.

And, Your Honor, we contend that that is a taking of property. If it's for a public purpose, they have not been compensated for that parcel.

Now, under the remedy, what remedy do we seek, Your Honor?

We would like, and this is the First Lutheran case which states, Your Honor, that from now on a regulatory taking is a taking of property. Heretofore, the U S Supreme Court, it is discussed in the case, said that they'd never had a proper case before them to determine whether or not a regulatory taking was the taking of property, as opposed to condemnation or what have you.

In a regulatory taking, Your Honor, the government regulation in essence takes all or substantially all of the parcel, or use of that parcel of property from the property owner. First English says, Your Honor, without going into the facts of the matter, Your Honor, it says that if there's a regulatory taking, that the landowner, if they're successful in challenging the ordinance, are entitled to damages for either temporary taking, they're entitled to compensatory damages.

Before the First English case, Your Honor, the —

THE COURT: You don't have any evidence in this case of damage, other than —

MR. RYAN: Right. We stipulated to what their damages —

THE COURT: The attorney fees.

MR. RYAN: Yes, that's correct, Your Honor. And the court costs that are included in the figure.

Your Honor, the First English case stands for the proposition that you (number one), if you take by regulation, then you must pay damages; and (number two), that even if it's a temporary taking, that is if one sued the governement says well, all right, we lost the case, we'll give you whatever. For that time period whatever your damages were for that time period, whether it be fair rental or whatever; in this case we have stipulated they would

be only attorney fees and court costs; that you're entitled to those damages. And that is new law, Your Honor.

Basically, the township is trying to foist upon us a public purpose. If it in fact is a public purpose, Your Honor, then the public at large must share the costs. It is an unnecessary and onerous burden for my people to assume that they have to —

THE COURT: What about a public purpose for fire protection?

MR. RYAN: Your Honor, there's nothing that says that a fire — we have to provide a passable roadway for this property, we understand that, a passable driveway.

Your Honor, if a fire truck can't use the twenty feet which —

THE COURT: In other words, to get rid of that argument, your theory is all you have to do is conform to whatever the building code is.

MR. RYAN: That's correct, Your Honor.

There's another way of enforcing that, Your Honor. The township has other ways to do that, which are reasonably tailored to meet that problem. We cannot provide sixty-six foot right-of-way, we never will be able to.

If the township is so concerned about the sixty-six feet right-of-way for these two parcels, then they can condemn the parcel, Your Honor, they can condemn the adjoining property parcel, pay the just compensation and the burden will be paid for by all of the township residents of Brandon Township.

Also, Your Honor, and lastly, the 1983 attorney fees, we have alleged and believe we have proven a Fifth Amendment taking of our property. If we do that, Your Honor, it is done by ordinance, under color of ordinance by a public entity, that is the township and we are entitled under 1983 to attorney fees.

Now the case cited, the Westland case, which was cited by brother counsel, Your Honor, is not a taking case, is not an amendment case, it is not a First Amendment or Fifth Amendment case, it only alleged due process of law violations.

Thank you.

MR. CAMPBELL: Your Honor, the Township in this kind of situation is between a rock and a hard place.

We're charged with the maintenance and the welfare of our citizens. We've decided based on our experience with private roads that we have to be sure the people have passable access to the property where fire equipment can get in, emergency equipment can get in.

This is a lake front parcel. The first time that a piece of emergency equipment can't get in there when there's a child drowning or there's a fire, the township will not only be criticized, they'll probably be sued.

THE COURT: What do you do with the other nine hundred ninety-eight where you have nothing but a driveway?

MR. CAMPBELL: Your Honor —

THE COURT: You have the same problem, don't you?

MR. CAMPBELL: Not necessarily.

THE COURT: You have to run hoses an extra two hundred feet.

MR. CAMPBELL: In this instance of course it's more than two hundred feet.

But when there's more than one dwelling involved, public interest becomes involved. And there's more than one dwelling involved in this situation and that's why the township adopted this private road ordinance.

Now there are two ordinances at issue, Judge, there's the private road ordinance, and this is a private road ordinance case, that's what this is. I mean it has nothing to do with the township going in there and using the parcels or telling them they can't use the parcels.

THE COURT: I understand that. And as I read the ordinance, it may be a reasonable ordinance under certain fact circumstances.

But the issue is it as applied to this parcel of land?

MR. CAMPBELL: I agree with that, Your Honor, I absolutely agree with that. And I think that the remedy that's available to the plaintiff in this case is an appeal to the Board of Appeals decision.

Now they've chose not to file this lawsuit for some fifteen months, which was their decision. And I think that the remedy that is available to them and to this court, and the proper remedy that's available, would be the granting of their petition under Count One in their complaint, which is for delayed appeal from the Court of Appeals decisions and then the Court can review that decision. And if the Court feels that the Board of Appeals was unreasonable, or should have acted otherwise, you can give such relief as your feel is proper.

I think that that's the case they have. I think that's that case for all of the 1933 cases, a reasonable state remedy. And that remedy is an appeal from the act of the Zoning Board of Appeals.

And if there's a reasonable state remedy, there's no 1983 case.

And I agree that under some fact situations this sort of thing may not be valid. But we certainly have the power to adopt it, we certainly have the power to enforce it, and that's what we've done in this case.

As it concerns the allegation that we have an obligation to condemn land and build private roads, we don't build roads in subdivisions, we don't have anything to do with the construction of roads. When a developer comes in and wants to develop a subdivision, Judge, whether it be two lots or a hundred, it's his responsibility to build the road. It's his responsibility to put in the improvements.

THE COURT: Let me ask you this, so you could condemn this under any number of statutes, but particularly under the Zoning Enabling Act you could condemn this, could you not?

MR. RYAN: Well, the Zoning Enabling Act, I don't think we could condemn it without some public purpose involved, except perhaps under the —

THE COURT: Well, public purpose, that's the one you're arguing, to get fire equipment in.

MR. RYAN: Are you talking about the roadway, Judge, or the property site?

THE COURT: Whatever. In other words, my reaction is if you're going to, for example, there are houses built there, and if you couldn't use the house, then you might have to condemn the whole lot, then rezone it, sell it a second time and take the loss. I mean that's a public purpose.

MR. RYAN: Under the Zoning Enabling Act, we can condemn for nonconforming uses.

THE COURT: That's right. And anything, anything under the police power.

MR. RYAN: Well, I don't know that they can condemn anything, Your Honor.

THE COURT: Sure.

MR. CAMPBELL: I think we can condemn for nonconforming uses.

THE COURT: Well, as long as it's for the purpose of enabling the zoning ordinance to be effective, if it's a reasonable zoning ordinance, that's what that section is for. I'll admit it's never used. No municipality has ever used it in the State, because you can't get elected to office if you do, but it's there for a good legislative purpose; and that is when there's risk of confiscation, and you want to do it in order to further police power, why you condemn it.

MR. CAMPBELL: The thing that actually happens in a thing like this is that the township specially assesses for the benefited property. What happens in this case if the township were to condemn it, they would assess the cost of condemnation.

THE COURT: If there's a special benefit —

MR. CAMPBELL: — against this parcel.

THE COURT: Yes.

MR. CAMPBELL: So this parcel would end up paying for the road.

THE COURT: And that might be the solution.

MR. CAMPBELL: Well, it certainly is one of several, Judge, it certainly is one of several.

But what we have here is not a not complex case, what we have here is the creation of an easement some years ago twenty feet wide to two tax descriptions, you know, you can call it one parcel or you can call it two, it's two tax descriptions, it's one parcel.

And subsequent enactment of ordinances by the township, both zoning and private road which controlled the use of the parcel. Now those are legitimate constitutional ordinances. The roadway was not built, so when the time comes to build them, the ordinances are in place. And the ordinances say you can't build it without conforming.

They go to the Zoning Board of Appeals and make application, and the Board denies it —

THE COURT: Let me ask you, what's your argument?

Let's assume hypothetically that Mr. Ryan does satisfy the case law, what about the attorney fees, what reason is there to include the attorney fees if you've indicated there's a delay of fifteen months. But he's not asking, there's no prayer for damages for rent or for taking away of the property. All he wants is the cost of the attorney fees.

MR. CAMPBELL: I think the only basis that attorney fees can be awarded to Mr. Ryan, Your Honor, is the 1983 claim. And I don't believe that he has a 1983 claim.

The case that my brother counsel, of counsel on my side of the bench, from my side of the table cited says, plaintiff claims he was denied due process. The deprivation of due process right, however, does not occur merely because a local planning board rejects a proposed development for erroneous reasons or makes demands exceeding its authority.

THE COURT: I'm familiar with that.

MR. CAMPBELL: I don't think he has a 1983 case. What he has, and there are cases that I cited, Judge, that say as long as there is a reasonable state remedy, you don't have a 1983 case. And they had a reasonable state remedy, they had the right to appeal.

And they've done that. They've dont it in a delayed fashion, but they have done it. And I don't think there's any other basis for awarding —

THE COURT: Of course that's the dog chasing his tail, because it gets back to whether there was a taking or not.

MR. CAMPBELL: Well, I suppose it does, Judge, but I don't think under First English there's a taking. Keystone, which

Mr. Ryan mentioned, the statute that was upheld by the Supreme Court said that they could take up to fifty percent of the coal under the surface of the earth, you know, and that statute —

THE COURT: They did better than that in the Village of Euclid, seventy-five percent —

MR. CAMPBELL: Yes, seventy-five percent, right. And there's no demonstration here of any taking of that magnitude.

If you say one lot and they're co-equal in their value, that's fifty percent. If you presume that one is worth more than the other, than obviously they would develop the more expensive one.

THE COURT: Yes.

How do you answer that, fifty percent, seventy-five percent argument?

MR. RYAN: Well, Your Honor, in the Keystone case, the court looked at the total amount of property owned by a company and found that it in essence only affected two percent of a hundred percent.

THE COURT: Yes.

MR. RYAN: They said that was not a taking.

In the Nolan case, the California case, the latest one, it was only a ten foot easement across the property they wanted along the beach front, and the court said no way, if you're going to take ten feet of that property, a minimal ten feet for only an easement, you have to pay, you have to pay because you've taken it.

THE COURT: What is your contrast here, what's your position?

MR. RYAN: The contrast here, Your Honor, we have two separate parcels purchased at two separate times. They're either taking one hundred percent of one parcel, or if you want to look at the whole property rights of the defendant — or plaintiff, you're taking fifty percent.

Now if the Court can say that no, two percent is not a taking in Keystone, but a ten foot easement across a parcel is a taking, for just compensation, this case certainly falls closer to that case than it does the two percent case, Your Honor.

THE COURT: The Court is going to take the question under advisement, and we'll set it down for 8:30 two weeks from yesterday, if that's agreeable to both of you, that's a motion day, and the Court will render its opinion that morning, or give you a written opinion, as the case may be, or suggest further arguments. The odds against that are great, so you can pretty much plan on a written opinion that date, which will be September 2, I believe.

So ordered.

* * *